

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(1) INTRODUCTION/1. Origins.

EXECUTORS AND ADMINISTRATORS (

Renaming of the Supreme Courts of England and Wales

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

1. THE OFFICE OF REPRESENTATIVE

(1) INTRODUCTION

1. Origins.

The right to appoint by will an executor to administer the personal estate and chattel interests in land of a testator derives from the earliest period of English law¹. The right later extended also to real estate². The appointment by the ecclesiastical courts of administrators in cases of intestacy or failure to appoint an executor developed much later³. Jurisdiction fell mainly to the ecclesiastical courts where personalty was concerned, to the common law courts where realty was concerned and to the courts of equity in those numerous cases where equity had intervened. The Chancery Division of the High Court now has jurisdiction in all matters concerning the administration and distribution of estates, including contentious probate jurisdiction, while non-contentious probate is assigned to the Family Division⁴.

1 Co Litt 111 b note (1) per Hargrave.

2 Ie by virtue of 32 Hen 8 c 1 (Wills) (1540) and 34 & 35 Hen 8 c 5 (Wills) (1542) (both repealed). Until 1897, however, real estate vested in the heir on intestacy: see PARA 363 note 1 post.

3 See *Hewson v Shelley*[1914] 2 Ch 13 at 39, CA, per Phillimore LJ.

4 See PARA 74 post. The non-contentious probate jurisdiction of the Family Division is a hangover from the former jurisdiction of the ecclesiastical courts (to which the Family Division is the successor). When it was decided to reorganise the allocation of business in the High Court (by what became the Administration of Justice Act 1970) so that the Chancery Division took over contentious probate from the former Probate Divorce and Admiralty Division (now the Family Division) it was felt that there was little to be gained, and much difficulty would be involved, in transferring non-contentious probate to the Chancery Division as well: 795 HC Official Report (5th series), 4 February 1970, col 447.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(1) INTRODUCTION/2. Meaning of 'executor'.

2. Meaning of 'executor'.

An executor¹ is the person appointed, ordinarily by the testator by his will or codicil², to administer the testator's property and to carry into effect the provisions of the will³. A special executor may be appointed or is deemed to be appointed in regard to settled land⁴.

An executor de son tort is one who takes upon himself the office of an executor, or intermeddles with the goods of a deceased person, without having been appointed an executor by the testator's last valid will or by a codicil to that will⁵, or without having obtained a grant of administration from a competent court⁶; and the term is therefore equally applicable in the case of an intestacy as in the case of testacy for there is no such term known to the law as an administrator de son tort⁷.

1 An executor is properly described as 'executor of AB' or 'executor of the will of AB' or 'executor of the will and trustee of the estate of AB'.

2 As to the express appointment of an executor by will see PARAS 6-7 post. As to the appointment of an executor other than by express appointment by the testator see PARAS 6, 8-10 post.

3 See *Shep Touch* (7th Edn) 400.

4 See PARA 229 et seq post. Such appointment now gives rise to a grant of administration, not probate: see the Non-contentious Probate Rules 1987, SI 1987/2024, r 29 (as substituted); and PARA 230 post. See also PARA 11 post. As to executors according to the tenor see PARA 9 post.

5 The term is not properly applicable to a person appointed as an executor who acts before probate: *Rogers v Frank* (1827) 1 Y & J 409 at 414. As to the liability of an executor de son tort see PARA 53 et seq post.

6 For a definition see *Went Off Ex* (14th Edn) 320. See also PARA 1 ante. As to the doctrine of relation back after a grant has been obtained see PARA 35 et seq post.

7 *Godolphin's Orphan's Legacy*, Pt II, c 8 s 2.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(1) INTRODUCTION/3. Meaning of 'administrator'.

3. Meaning of 'administrator'.

An administrator¹ is a person appointed by a court of competent jurisdiction² to administer the property of a deceased person³. The office of administrator is said to be *dative*, because it derives from such a grant⁴, whereas the office of executor derives from the will of the deceased person.

1 As to administrators generally see PARA 33 et seq post; and as to the forms of grant of letters of administration see PARA 196 et seq post. For the purposes of the Administration of Estates Act 1925, 'administration' means, with reference to the real and personal estate of a deceased person, letters of administration, whether general or limited, or with the will annexed or otherwise; and for the purposes of that Act 'administrator' means a person to whom administration is granted: s 55(1)(i), (ii). 'Real estate', save as provided in Pt IV (ss 45-52) (as amended) (see PARA 591 note 6 post), means real estate, including chattels real, which by virtue of Pt I (ss 1-3) (s 2 as amended) devolves on the personal representative of a deceased person: s 55(1)(ix). 'Will' includes codicil: s 55(1)(xxviii). An administrator is properly described as 'administrator of the estate of AB'.

2 The court of competent jurisdiction is the High Court, Family Division for non-contentious matters, and the High Court, Chancery Division and the county court in contentious matters: see PARAS 1 ante, 74 post. Nothing in the Administration of Estates Act 1925 derogates from the powers of the High Court which exist independently of that Act or alters the distribution of business between the several divisions of the High Court,

or operates to transfer any jurisdiction from the High Court to any other court: s 53(1). Nothing in that Act affects any unrepealed enactment in a public general Act dispensing with probate or administration as respects personal estate not including chattels real: s 53(2).

3 As to the circumstances in which and the persons to whom grants of administration are made see PARA 155 et seq post.

4 See *Shep Touch* (7th Edn) 400.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(1) INTRODUCTION/4. Meaning of 'personal representative'.

4. Meaning of 'personal representative'.

The expression 'personal representative' is used to describe either an executor (whether he has proved the will or not¹) or an administrator, and is defined by the Administration of Estates Act 1925, for the purposes of that Act, to mean the executor, original or by representation, or administrator for the time being of a deceased person². It includes a special executor³ and, as regards liability for inheritance tax, an executor de son tort⁴. The personal representatives represent the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate⁵ and are deemed in law to be his heirs and assigns within the meaning of all trusts and powers⁶.

1 See *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991 at 1001, [1974] 1 WLR 583 at 593-594 per Goulding J.

2 Administration of Estates Act 1925 s 55(1)(xi). The definitions in the Law of Property Act 1925 s 205(1)(xviii) (see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1387), the Trustee Act 1925 s 68(1) PARA (9) (see TRUSTS vol 48 (2007 Reissue) PARA 602), and the Settled Land Act 1925 s 117(1)(xviii) (see SETTLEMENTS vol 42 (Reissue) PARA 697), are to this extent the same. 'Representation' means the probate of a will and administration, and the expression 'taking out representation' refers to the obtaining of the probate of a will or of the grant of administration: Administration of Estates Act 1925 s 55(1)(xx). For the meaning of 'will' see PARA 3 note 1 ante; and for the meaning of 'administration' see PARA 3 note 1 ante.

3 In the definition of 'personal representative', 'executor' includes a person deemed to be appointed executor as respects settled land: *ibid* s 55(1)(xi). Cf the Settled Land Act 1925 s 117(1)(xviii); and the Land Registration Act 1925 s 3(xvii). See also PARA 229 post.

4 In the Inheritance Tax Act 1984, 'personal representative' includes any person by whom or on whose behalf an application for a grant of administration or for the resealing of a grant made outside the United Kingdom is made, and any such person as is mentioned in s 199(4)(a) (ie any person who takes possession of or intermeddles with, or otherwise acts in relation to, property so as to become liable as executor or trustee): see s 272. As to the liability of personal representatives for inheritance tax see ss 200(1)(a), 204(1). See further INHERITANCE TAXATION vol 24 (Reissue) PARAS 432, 636. As regards any liability for the payment of inheritance tax, 'personal representative' includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court: Administration of Estates Act 1925 s 55(1)(xi). 'Property' includes a thing in action and any interest in real or personal property: s 55(1)(xvii). As to the executor de son tort see PARA 53 et seq post.

5 *Ibid* s 1(3).

6 *Ibid* s 1(2). Covenants relating to land of a covenantee are deemed to be made with the covenantee and his successors in title; there is corresponding provision regarding covenants entered into by covenantors: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 256.

UPDATE

4 Meaning of 'personal representative'

NOTES 2, 3--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(1) INTRODUCTION/5. Personal representative as trustee.

5. Personal representative as trustee.

The expressions 'trust' and 'trustee' in the Trustee Act 1925 extend to the duties incident to the office of a personal representative, and 'trustee', where the context of that Act so admits, includes a personal representative¹. The definition in the Trustee Act 1925 also applies for the purposes of the Limitation Act 1980, so that the provisions of that Act concerning trusts and trustees apply to the estates of deceased persons and personal representatives². The administration of the property of a deceased person, whether he dies testate or intestate, is a trust within the meaning of the Judicial Trustees Act 1896³, so the court may appoint a judicial trustee either to act jointly with or in place of a personal representative⁴.

1 See the Trustee Act 1925 s 68(1) PARA (17); and TRUSTS vol 48 (2007 Reissue) PARA 601. The Trustee Act 1925 does not, however, apply this definition to a special executor or to an executor de son tort: see s 68(1) PARA (9); and PARA 52 note 2 post. As to special executors see PARA 229 post; and as to the executor de son tort see PARA 53 et seq post.

2 See the Limitation Act 1980 s 38(1); and LIMITATION PERIODS vol 68 (2008) PARA 1094.

3 See the Judicial Trustees Act 1896 s 1(2); and TRUSTS vol 48 (2007 Reissue) PARA 760. As to the power of the court to substitute or remove personal representatives under the Administration of Justice Act 1985 s 50 see PARA 706 post.

4 See the Judicial Trustees Act 1896 s 1(1); and TRUSTS vol 48 (2007 Reissue) PARA 760. See also *Re Ratcliff* [1898] 2 Ch 352 at 356. As to the transition of office from executorship to trusteeship see PARAS 568-570 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/6. In general.

(2) THE EXECUTOR

(i) Appointment of Executors

6. In general.

An executor may be appointed either: (1) expressly by the testator in the body of his will¹; (2) by the exercise of a power of nominating an executor conferred by the testator by his will²; (3) by implication from the testator's will, when the executor is known as an executor according to the tenor³; or (4) by virtue of statutory provisions⁴. The executor may accept⁵ or renounce⁶ the office. Since his title derives from the will, he may in general act before probate has been granted⁷.

- 1 See PARA 7 post. It was formerly possible to say 'that a will is the only bed where an executor can be begotten or conceived; for where no will is there can be no executor; and this is so conspicuous and evident to every low capacity that it needs no proof or illustration': Went Off Ex (14th Edn) 3.
- 2 See PARA 8 post.
- 3 See PARA 9 post.
- 4 See PARAS 10, 167-168, 229 post.
- 5 See PARAS 23-25 post.
- 6 See PARAS 26-28 post.
- 7 See further PARAS 29-32 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/7. Express nomination by testator.

7. Express nomination by testator.

An express appointment of an executor by the testator must name the appointee and describe him as executor, and must form part of a validly executed will¹. A testator may appoint any number of executors, but probate may not be granted to more than four persons in respect of the same part of his estate².

If a question arises as to the identity of the person appointed, the court may admit extrinsic evidence to assist (including evidence of the testator's intention) if the relevant wording of the will is meaningless, or is ambiguous on its face, or if evidence, other than evidence of the testator's intention, shows that the wording is ambiguous in the light of surrounding circumstances³. There may be such an uncertainty with regard to the person intended as to render the appointment entirely void⁴.

If the court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of a clerical error or a failure to understand the testator's instructions, it may order rectification of the will⁵.

1 See the Wills Act 1837 s 9 (as substituted); and WILLS vol 50 (2005 Reissue) PARA 351 et seq. In relation to deaths before 1 January 1983, a direction beneath the testator's signature did not form part of the will and could not have effect: *Re Woods* (1868) LR 1 P & D 556; *Re Dallow* (1866) LR 1 P & D 189; *Re Evans* (1923) 128 LT 669. In relation to deaths on or after 1 January 1983, the Wills Act 1837 s 9 (substituted by the Administration of Justice Act 1982 s 17) no longer requires the testator's signature to be at the end of the will: see WILLS vol 50 (2005 Reissue) PARA 358. As to the right to have proved a will which appoints an executor even though there is no property to dispose of see PARA 103 post.

2 Supreme Court Act 1925 s 114(1). Section 114(1) refers to 'the same part of the estate' whereas the provision it re-enacts (the Supreme Court of Judicature (Consolidation) Act 1925 s 160(1) (repealed)) referred to 'the same property'. The latter words were construed in *Re Holland* [1936] 3 All ER 13 to mean 'the same estate'. In that case the testator appointed four general executors and one literary executor in respect of certain manuscripts, and it was held that one of the five must renounce before probate could be granted. The change in wording almost certainly means that *Re Holland* supra does not apply to the Supreme Court Act 1925 s 114(1), so that the estate as a whole may be the subject of grants to more than four personal representatives but no individual asset of the estate can be the subject of a grant to more than four. The court will not force an executor to renounce; if he is unwilling to do so, probate will be granted to the permitted number and power

reserved to the other or others to prove on a vacancy occurring: see PARA 152 post. As to renunciation see PARAS 26-28 post.

3 See the Administration of Justice Act 1982 s 21 (which applies where the testator died on or after 1 January 1983); and WILLS vol 50 (2005 Reissue) PARAS 483, 507-508. In relation to the wills of persons who died before 1 January 1983, the court would look at the surrounding circumstances at the date of the making of the will (*Grant v Grant* (1869) LR 2 P & D 8; *Re De Rosaz* (1877) 2 PD 66; *Re Twohill* (1879) 3 LR Ir 21; *Re Brake* (1881) 6 PD 217; *Re O'Reilly* (1873) 43 LJP & M 5. See, however, *Re Jones* (1927) 43 TLR 324, where the holder of an office was appointed executor, not by name, but by reference to the office, and probate was granted to the holder of the office at the death of the testator. The court would not, however, accept evidence of the testator's actual intention (*Re Twohill* supra; *Re Chappell* [1894] P 98) except where the description was equally applicable in all its parts to two or more persons (*Re Ashton* [1892] P 83; *Re Hubbuck* [1905] P 129; and see also *Charter v Charter* (1874) LR 7 HL 364). Where there was only one individual exactly answering to the name and description the court would not admit evidence to show that some other person was intended: *Re Peel* (1870) LR 2 P & D 46. This is probably still the case in relation to deaths on or after 1 January 1983, subject to the possibility of rectification (see the text to note 5 infra).

4 *Re Baylis* (1862) 2 Sw & Tr 613 (appointment of 'any two of my sons' held void for uncertainty); *Re Blackwell* (1877) 2 PD 72 (appointment of 'one of' the testator's sisters held void for uncertainty even though only one of them was living at his death. Cf *Re Horgan* [1971] P 50, [1969] 3 All ER 1570 (appointment of a firm of solicitors 'who may act through any partner or partners of that firm or their successors in business at the date of my death not exceeding two in number' held to be an appointment of all the partners in the firm at the date of the testator's death and not void for uncertainty). As to appointments of partnerships see PARA 19 post.

5 See the Administration of Justice Act 1982 s 20(1) (which applies where a testator died on or after 1 January 1983); and WILLS vol 50 (2005 Reissue) PARA 408. The application for rectification may not, except with the permission of the court, be made after the end of six months from the date of the first grant of representation: see s 20(2); and WILLS vol 50 (2005 Reissue) PARA 408.

UPDATE

7 Express nomination by testator

NOTE 2--Corrigendum: for 'Supreme Court Act 1925 s 114(1)', in both places where it occurs, read 'Supreme Court Act 1981 s 114(1)'. As from 1 October 2009 (see SI 2009/1604) 1981 Act cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/8. Nomination by person other than testator.

8. Nomination by person other than testator.

By his will a testator may authorise another to nominate an executor, and effect will be given to such nomination¹. It would appear that the person authorised to nominate the executor may nominate himself².

1 *Re Cringan* (1828) 1 Hag Ecc 548; *Re Deichman* (1842) 3 Curt 123. The power to authorise is apparently not affected by the Wills Act 1837: see *Jackson and Gill v Paulet* (1851) 2 Rob Eccl 344.

2 *Re Ryder* (1861) 2 Sw & Tr 127. As to the position of a person empowered to appoint a trustee see TRUSTS vol 48 (2007 Reissue) PARA 818 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/9. Executor according to the tenor.

9. Executor according to the tenor.

Where a testator fails to nominate a person in express terms to be his executor, but upon a reasonable construction of his will it appears that a particular person has been appointed to perform the essential duties of an executor, such an appointment is sufficient to constitute that person an executor¹. The person so appointed is called an 'executor according to the tenor'. Accordingly, a person will be an executor according to the tenor where, being made residuary legatee, he is appointed to discharge all lawful demands against the estate²; or where the testator, having directed all his just debts and funeral and testamentary expenses to be duly paid and satisfied as soon as conveniently may be after his decease, gives all his personal estate to a person upon trust to convert into money, get in and receive the same, and to divide the money so produced equally amongst his children³; or even where he is simply appointed to pay all the testator's just debts⁴.

If a testator employs the word 'trustee' in a loose sense, the person appointed trustee is entitled to obtain probate of the will⁵; but where it cannot be gathered from the will that the person named as trustee is required to pay the testator's debts and generally to administer the estate, he is not entitled to probate⁶. A person may be an executor according to the tenor even in a case where other persons have been expressly appointed executors in the will⁷. The addressee of a testamentary instrument may be an executor according to the tenor⁸.

1 *Re Montgomery* (1846) 5 Notes of Cases 99; *Re Collett* (1857) Dea & Sw 274; *Re Adamson* (1875) LR 3 P & D 253 (where the essential duties of an executor were defined to consist of the collection of the deceased's assets, the payment of his funeral expenses and debts and the discharge of the legacies); *Re Brown* (1910) 54 Sol Jo 478.

2 *Grant v Leslie* (1819) 3 Phillim 116. Where a person is appointed universal legatee merely, without any directions, it is not the practice to grant probate to him as executor according to the tenor, but he is entitled to administration with the will annexed: *Re Oliphant* (1860) 1 Sw & Tr 525; *Re Pryse* [1904] P 301, CA; cf *Re Dulson* (1929) 140 LT 470. As to administration with the will annexed see PARAS 196-200 post.

3 *Re Baylis* (1865) LR 1 P & D 21; *Re Drumm* [1931] NI 12. A direction to pay debts is not indispensable: *Re M'Kane* (1887) 21 LR Ir 1.

4 *Re Cook* [1902] P 114. See also *Re Manly* (1862) 3 Sw & Tr 56; *Re Bell* (1878) 4 PD 85; *Re Wilkinson* [1892] P 227; *Re Way* [1901] P 345.

5 *Re Earl Leven and Melville* (1889) 15 PD 22; *Re Russell, Re Laird* [1892] P 380; *Re Shaw* (1895) 73 LT 192; *Re Nussey* (1898) 78 LT 169; *Re Kirby* [1902] P 188.

6 *Boddicott and Hamilton v Dalzell* (1756) 2 Lee 294 at 296; *Re Jones* (1861) 2 Sw & Tr 155; *Re Fraser* (1870) LR 2 P & D 183; *Re Punchard* (1872) LR 2 P & D 369; *Re Toomy* (1864) 3 Sw & Tr 562; *Re Lowry* (1874) LR 3 P & D 157; *Re Love* (1881) 7 LR Ir 178; *Re Mackenzie* [1909] P 305.

7 *Grant v Leslie* (1819) 3 Phillim 116; *Re Brown* (1877) 2 PD 110; *Re Lush* (1887) 13 PD 20; *Re Wright* (1908) 25 TLR 15.

8 *Re Manly* (1862) 3 Sw & Tr 56; *Re Stanley* [1916] P 192.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/10. Statutory appointment of executors.

10. Statutory appointment of executors.

The court has statutory power to appoint additional personal representatives in specified cases¹, and special executors are statutorily deemed to have been appointed by the will in relation to settled land in certain circumstances².

1 See the Supreme Court Act 1981 s 114(4); and PARAS 167-168 post.

2 See the Administration of Estates Act 1925 s 22; and PARA 229 post. Such appointment gives rise to a grant of administration, not probate: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29 (as substituted); and PARA 230 post.

UPDATE

10 Statutory appointment of executors

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/11. General and special executors.

11. General and special executors.

In the ordinary course, a person is appointed executor indefinitely and is therefore charged with the administration of the whole will and of all the testator's property¹. The testator may, however, limit the appointment², or executors may be deemed to be appointed by statute for limited purposes or special property, and such an executor is called a special executor³. The directions in a will limiting the appointment must be clear⁴. Where special executors are appointed for limited purposes or particular property and other executors are appointed generally for all other purposes and property, those other executors are called the general executors⁵.

1 Such an executor has been called a universal executor: *Re Parker's Trusts* [1894] 1 Ch 707 at 720. He has also been called a general executor, but that term is now usually applied to executors who have the general administration of the estate where there are special executors for certain specified property.

2 The usual limitation is in the appointment of special executors of property outside the jurisdiction. The wills of testators who have foreign property often appoint separate executors or trustees of the foreign property. Where it is desired to place particular properties which are within the jurisdiction in the care of particular persons, separate executors may be appointed, for example literary executors or business executors. In such a case, however, it may be preferable to appoint executors for the whole estate, but separate sets of trustees for each particular property. A special grant may be required for settled land: see PARA 229 post. As to the appointment of different executors for different properties see further PARA 12 post. As to the application of the statutory limitation of the number of executors where general executors and a special executor are appointed see PARA 7 ante.

3 See PARA 229 post.

4 *Lynch v Bellew and Fallon* (1820) 3 Phillim 424.

5 Although called general executors, the grant to them will be a 'save and except' one and not a 'general' grant of the whole estate devolving by law on the personal representatives.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/12. Different executors for different properties.

12. Different executors for different properties.

A testator may appoint different executors for different parts of his estate¹; he may appoint certain persons executors of his property abroad or of his property in a particular country and others of his property in England², and indeed this is commonly done. He may also appoint separate executors of real estate, including real estate vested in him as sole trustee. The High Court may grant probate or administration in respect of any part of the estate of a deceased person, limited in any way the court thinks fit³. Where the deceased's estate is known to be insolvent the grant of representation to the estate vested in the deceased beneficially cannot be severed, except as regards a trust estate in which he had no beneficial interest⁴. If special executors are appointed by the will but do not prove and the general executors obtain a grant of probate, the special executors, merely by obtaining a limited grant at a later date, cannot invalidate the acts of general executors done pursuant to the grant to them⁵.

An executor appointed solely to administer property abroad is not entitled to probate in this country⁶, and a person who is nominated executor only of the property not specified in the will, and who is precluded from dealing with the property disposed of by the will, is similarly disentitled, but he may obtain letters of administration with the will annexed⁷.

1 Went Off Ex (14th Edn) 29; *Rose v Bartlett* (1633) Cro Car 292. See also PARA 11 note 2 ante. For the limit on the number of executors to whom a grant may be made see PARA 7 ante.

2 *Re Harris* (1870) LR 2 P & D 83; *Re Cohen's Executors and LCC* [1902] 1 Ch 187.

3 Supreme Court Act 1981 s 113(1). As to applications under s 113 see PARA 227 post. Probate or administration may be granted where the deceased left no estate: Administration of Justice Act 1932 s 2(1) (repealed, but the Supreme Court Act 1981 s 25 provides that the court has the probate jurisdiction which it had immediately before the commencement of the Supreme Court Act 1981 (see PARA 73 post)).

4 Supreme Court Act 1981 s 113(2).

5 *Re Parker's Trusts* [1894] 1 Ch 707. See also the Administration of Estates Act 1925 s 8; and PARA 25 post. As to the devolution of real estate see PARA 363 post. As to special personal representatives for settled land see PARA 229 post.

6 *Velho v Leite* (1864) 3 Sw & Tr 456.

7 *Re Wakeham* (1872) LR 2 P & D 395. As to administration with the will annexed see PARAS 196-200 post.

UPDATE

12 Different executors for different properties

NOTES 3, 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981:
Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI
2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1.
THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/13.
Conditional and substituted appointments.

13. Conditional and substituted appointments.

A testator may appoint his or her spouse to be executor during the widowhood or widowerhood of the spouse¹, or his son to be his executor upon attaining his majority². He may make the appointment conditional upon the happening of a certain event³, and he may provide for the determination of the appointment or the substitution of one executor for another upon the happening of a given event⁴.

1 Went Off Ex (14th Edn) 29.

2 Went Off Ex (14th Edn) 22-23. As to the appointment of minors see PARA 16 post.

3 *Re Langford* (1867) LR 1 P & D 458.

4 *Re Lighton* (1828) 1 Hag Ecc 235; *Re Johnson* (1858) 1 Sw & Tr 17; *Re Betts* (1861) 30 LJPM & A 167; *Re Lane* (1864) 33 LJPM & A 185; *Re Foster* (1871) LR 2 P & D 304; *Re Freeman* (1931) 146 LT 143.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1.
THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(i) Appointment of Executors/14.
Failure of appointment as a result of divorce or annulment of marriage.

14. Failure of appointment as a result of divorce or annulment of marriage.

Where, after a testator has made a will, his marriage is dissolved or annulled¹, and he dies on or after 1 January 1996², any provisions of the will appointing executors or trustees which appoint the testator's former spouse take effect as if the former spouse had died on the date of the dissolution or annulment of the marriage, except in so far as a contrary intention appears by the will³.

1 ie either by a decree of a court of civil jurisdiction in England and Wales, or by a court of some other jurisdiction and the divorce or annulment is recognised in England and Wales: see the Wills Act 1837 s 18A(1) (as added and amended); and WILLS vol 50 (2005 Reissue) PARA 469.

2 In relation to testators who died on or after 1 January 1983 but before 1 January 1996, a will which appointed the testator's then spouse as an executor had effect as if that appointment were omitted, if the marriage had been dissolved or annulled after the will was made, except in so far as a contrary intention appeared by the will: see *ibid* s 18A(1) (as added); and WILLS vol 50 (2005 Reissue) PARA 468.

3 See *ibid* s 18A(1) (as added and amended); and WILLS vol 50 (2005 Reissue) PARA 469.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/15. The choice of executor.

(ii) Persons Eligible for Appointment

15. The choice of executor.

No restriction whatever exists upon the choice of an executor. The monarch may be appointed and if appointed will nominate trustees to execute for her and auditors to whom the trustee are to account¹. An alien may be appointed². A convicted criminal may be appointed³; but the fact that the executor is serving a prison sentences may make it impossible for him to administer the estate so that the court may grant administration to others under its discretionary powers⁴.

1 Went Off Ex (14th Edn) 39; 4 Co Inst 335; Bac Abr, Prerogative (E) 1; Chitty's Law of the Prerogatives of the Crown p 379. See also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 845.

2 As to an alien's right to hold property see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13.

3 See eg *Smethurst v Tomlin and Bankes* (1861) 2 Sw & Tr 143 at 147.

4 *Re S* [1967] 2 All ER 150, [1968] P 302. As to the court's discretionary power see PARA 180 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/16. Minors.

16. Minors.

A minor¹ may be appointed executor², but he cannot validly exercise the office until he has attained full age³. Where a testator by his will⁴ appoints a minor to be an executor, the appointment does not operate to vest in the minor the estate⁵, or any part of the estate, of the testator, or to constitute him a personal representative for any purpose, unless and until probate is granted to him in accordance with probate rules⁶.

Where a person to whom a grant would otherwise be made is a minor⁷, administration with the will annexed for his use and benefit is granted to a parent of his with parental responsibility⁸, to another person with parental responsibility, to a guardian of his, or the residuary beneficiary, or to such other person as the court thinks fit until the minor attains the age of 18⁹. Similarly, if there are several executors and all are minors, administration with the will annexed will be granted to their parents or guardians or other persons with parental responsibility, or the residuary beneficiary, until the first of the co-executors attains that age¹⁰. The administration will then terminate¹¹ and the executor who first attains that age will be entitled to probate¹². If adult executors are appointed jointly with a minor, probate may be granted to the executor or executors not under disability¹³ with power reserved to the minor executor, and the minor is entitled to apply for probate on attaining the age of 18¹⁴. In such a case, no grant of administration for the use and benefit of the minor may be made unless the executors who are not under a disability renounce or, on being cited to accept or refuse a grant, fail to make an effective application for it¹⁵.

1 le a person under the age of 18 years: see the Family Law Reform Act 1969 ss 1, 9, 12; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-3.

2 2 Bl Com (14th Edn) 503; 2 Swinburne on Wills (7th Edn) 652; Went Off Ex (14th Edn) 390. An unborn child may be appointed (2 Bl Com (14th Edn) 503; Godolphin's Orphan's Legacy, Pt II, c 9 s 2), and if more than one child is born, all will be admitted executors (Godolphin's Orphan's Legacy (3rd Edn) 102).

3 See the Supreme Court Act 1981 s 118; and the Non-contentious Probate Rules 1987, SI 1987/2024, r 32 (as amended) (see PARA 203 post).

4 'Will' includes a nuncupative will and any testamentary document of which probate may be granted: Supreme Court Act 1981 s 128. As to nuncupative wills see PARA 130 post.

5 'Estate' means real and personal estate, and 'real estate' includes: (1) chattels real and land in possession, remainder or reversion and every interest in or over land to which the deceased person was entitled at the time of his death; and (2) real estate held on trust or by way of mortgage or security, but not money secured or charged on land: *ibid* s 128 (definition amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

6 Supreme Court Act 1981 s 118. 'Probate rules' means rules of court made under s 127 (see PARA 81 post): s 128. As to the rules of court made under this provision see the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended). As to the grant of probate see the text to note 9 *infra*.

7 le where all persons appointed executors are under disability and are or include minors, or where all those persons so appointed who are not under disability renounce or fail to take a grant after being cited to do so: see the Non-contentious Probate Rules 1987, SI 1987/2024, rr 32 (as amended), 33; and PARAS 203, 205 post.

8 As to parental responsibility see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 133 et seq.

9 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32 (as amended); and PARA 203 post.

10 See the authorities cited in note 11 *infra*; and PARA 205 post.

11 Shep Touch (7th Edn) 491; Godolphin's Orphan's Legacy, Pt II, c 30 s 6; 4 Burn's Ecclesiastical Law (9th Edn) 384 et seq; Bac Abr, Executors and Administrator (B) 1(3); *Bennet v Baud* (1664) 1 Sid 185; *Taylor v Watts* (1676) Freem KB 425.

12 See the Non-contentious Probate Rules 1987, SI 1987/2024, rr 32 (as amended), 33; and PARAS 203, 205 post.

13 *Pigot v Gascoin* (1616) 1 Brownl 46; *Foxwist v Tremain* (1670) 1 Mod Rep 47; *Colborne v Wright* (1678) 2 Lev 239; Bac Abr, Executors and Administrators (B); Com Dig, Administration (B 12). As to the reservation of power to the minor to prove the will at a later date see PARA 205 post.

14 See the Non-contentious Probate Rules 1987, SI 1987/2024, r 33(1); and PARA 205 post.

15 See *ibid* r 33(2); and PARA 205 post.

UPDATE

16 Minors

NOTES 3, 4, 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/17. Mentally incapacitated persons.

17. Mentally incapacitated persons.

If the person appointed executor is incapable of managing his affairs by reason of mental incapacity, probate will not be granted to him during the period of disability, but if he is sole executor letters of administration with the will annexed will be granted to some person on his behalf¹. If a mentally incapacitated person is appointed one of several executors, power will be reserved to him to prove after the removal of the disability².

1 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 35 (as amended); and PARA 212 post.

2 *Evans v Tyler* (1849) 2 Rob Eccl 128.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/18. Corporations.

18. Corporations.

A company or other corporate body may be appointed executor¹, but cannot itself take a grant unless it is a trust corporation². The practice³ as regards companies or other corporate bodies which are not trust corporations⁴ is to grant administration to a nominee, or in the case of a foreign corporation to an attorney, for the use and benefit of the corporation⁵. Where a trust corporation is named in a will⁶ as executor, the High Court may grant probate to the corporation either solely or jointly with another person, as the case may require, and the corporation may act as executor accordingly⁷; and, similarly, administration⁸ may be granted to a trust corporation either solely or jointly with another person, and the corporation may act as administrator accordingly⁹.

1 A corporation sole may also be an executor: *Went Off Ex* (14th Edn) 39; *Godolphin's Orphan's Legacy*, Pt II, c 6. For examples of corporations sole see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1112. A corporation sole may be granted probate: *Re Haynes* (1842) 3 Curt 75. The appointment of a corporation sole as executor during a vacancy in the office is valid, but may be renounced or disclaimed by the successor in the office: see the Law of Property Act 1925 s 180(3); and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1246.

The Public Trustee is a corporation sole with power to accept probates or letters of administration of any kind either as principal or as agent for any other person: see the Public Trustee Act 1906 ss 1, 6(1); the Public Trustee Rules 1912, SR & O 1912/348, r 6(c); and TRUSTS vol 48 (2007 Reissue) PARA 771. However, this provision is overshadowed in relation to the Public Trustee's capacity to act as an executor by the fact that the Public Trustee is also a trust corporation (see note 4 *infra*). As to administration by the Public Trustee see PARA 176 post. As to insolvent estates generally see PARA 399 *et seq* post. As to fees see PARA 44 post. As to the Public Trustee generally see TRUSTS vol 48 (2007 Reissue) PARA 766 *et seq*.

2 See the Non-contentious Probate Rules 1987, SI 1987/2024, r 36 (as amended); and PARA 175 post. Older authorities state that a corporation aggregate cannot take a grant because it cannot take the oath necessary to probate (*Went Off Ex* (14th Edn) 39; 1 Bl Com (14th Edn) 476), and it is notable that Supreme Court Act 1981 s 115(3) expressly enables an authorised officer of a trust corporation to act on behalf of the corporation in the matters of oaths and affidavits (see note 9 *infra*).

3 It was formerly the practice, where a corporation aggregate was named executor, to appoint a person styled a syndic to receive administration with the will annexed, and the syndic was sworn like any other administrator: see eg *Re Darke* (1859) 1 Sw & Tr 516; *Re Hunt* [1896] P 288. Where a corporation aggregate was appointed together with one or more individual executors a grant could not be made to the syndic unless all those individually appointed renounced probate: *Re Martin* (1904) 90 LT 264. The Administration of Justice Act 1920 s 17 (repealed) gave power to grant probate to a corporation having its principal place of business in the

United Kingdom by its corporate name. Section 17 was repealed by the Administration of Estates Act 1925 s 56, Sch 2 Pt II. The effect of the repeal was to restore the former practice of granting administration to a nominee, except in the case of trust corporations.

4 'Trust corporation' means the Public Trustee or a corporation either appointed by the court in any particular case to be a trustee or authorised by rules made under the Public Trustee Act 1906 s 4(3), to act as custodian trustee: Administration of Estates Act 1925 s 55(1)(xxvi); Supreme Court Act 1981 s 128. For the purposes of the Administration of Estates Act 1925 and the Supreme Court Act 1981, the expression 'trust corporation' includes the Treasury Solicitor, the Official Solicitor and any person holding any other official position prescribed by the Lord Chancellor, and, in relation to the property of a bankrupt and property subject to a deed of arrangement, includes the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable ecclesiastical and public trusts, also includes any local or public authority so prescribed, and any other corporation constituted under the laws of the United Kingdom or any part of it which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part of it by way of profits amongst any of its members, and is authorised by him to act in relation to such trusts as a trust corporation: Law of Property (Amendment) Act 1926 s 3(1) (amended by the Supreme Court Act 1981 s 152(1), Sch 5). For the corporations authorised to act as custodian trustees see the Public Trustee Rules 1912, SR & O 1912/348, r 30 (as substituted and amended); and TRUSTS vol 48 (2007 Reissue) PARA 794. The Church of England Pensions Board is also included by virtue of the Clergy Pensions Measure 1961 s 31: see ECCLESIASTICAL LAW. The expression 'Treasury Solicitor' means the solicitor for the affairs of Her Majesty's Treasury, and includes the solicitor for the affairs of the Duchy of Lancaster: Law of Property (Amendment) Act 1926 s 3(2). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541. As to the Official Solicitor see COURTS. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. As to the solicitor for the Duchy of Lancaster see PARA 174 post.

For the purposes of the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended), 'trust corporation' means a corporation within the meaning of the Supreme Court Act 1981 s 128 as extended by the Law of Property (Amendment) Act 1926 s 3(1): Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1).

See *Re Skinner* [1958] 3 All ER 273, [1958] 1 WLR 1043 (effect of scheme of arrangement and amalgamation between trust corporation and another company: see PARA 24 post). See also *Re Bigger* [1977] Fam 203, [1977] 2 All ER 644 (probate can be granted to the Bank of Ireland; distinguishing *Re Barlow* [1933] P 184).

5 See the Non-contentious Probate Rules 1987, SI 1987/2024, r 36(4) (as amended); and PARA 221 post. See also *Practice Direction* [1956] 1 All ER 305, [1956] 1 WLR 127.

6 For the meaning of 'will' see PARA 16 note 4 ante.

7 Supreme Court Act 1981 s 115(1)(a). Probate or administration may not be granted to any person as nominee of a trust corporation: s 115(2). Cf note 3 supra. Any officer authorised for the purpose by a trust corporation or its directors or governing body may, on behalf of the corporation, swear affidavits, give security and do any other act which the court may require with a view to the grant to the corporation of probate or administration, and the acts of an officer so authorised are binding on the corporation: s 115(3). See also the Non-Contentious Probate Rules 1987, SI 1987/2024, r 36 (as amended); and PARA 175 post. As from a day to be appointed, the Supreme Court Act 1981 s 115(1)-(3) is applied to other types of corporation which may be permitted to provide probate services, and which are specified in Solicitors Act 1974 s 23(2)(e)-(h) (as prospectively added) (see LEGAL PROFESSIONS vol 65 (2008) PARA 592): see the Supreme Court Act 1981 s 115(4) (prospectively added by the Courts and Legal Services Act 1990 s 54(2), as from a day to be appointed). At the date at which this volume states the law, no such day had been appointed.

8 'Administration' includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes: Supreme Court Act 1981 s 128.

9 Ibid s 115(1)(b). See also note 7 supra.

UPDATE

18 Corporations

NOTES 2, 4, 7, 8--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/19. Partnerships.

19. Partnerships.

The appointment as executors of an ordinary partnership firm is considered to be an appointment not of the firm collectively, but of the individuals composing the firm¹. The appointment only extends to the members of the firm at the date of the will², unless a contrary intention is there expressed³.

1 *Re Fernie* (1849) 6 Notes of Cases 657; *Re Horgan* [1971] P 50, [1969] 3 All ER 1570. As to partnerships generally see PARTNERSHIP.

2 *Re Fernie* (1849) 6 Notes of Cases 657. Accordingly, the dissolution of the firm after the date of the will does not affect the appointment: *Re Fernie* supra.

3 For a case where a contrary intention was held to exist see *Re Horgan* [1971] P 50, [1969] 3 All ER 1570. If there are more partners than can take a grant, or the testator expresses a wish that not more than a specified number take out a grant, or it is otherwise not appropriate for all of them to do so, power to prove will be reserved to the partners who do not take a grant. As to the statutory limit on numbers see PARA 7 ante. An appointment of eg 'any two of the partners' in a firm would be void for uncertainty: see PARA 7 note 4 ante.

As to the appointment at the testator's death of the partners in a solicitor's firm as executors see further articles by RT Oerton in 64 Law Society's Gazette (1967) 244, 343, and 67 Law Society's Gazette (1970) 46. As to the procedure when a grant is being obtained under such an appointment see PARA 129 post.

UPDATE

19 Partnerships

NOTE 3--See also *Re Rogers* [2006] EWHC 753 (Ch), [2006] 2 All ER 792 (testatrix appointed partners of certain firm as executors, but firm later converted to limited liability partnership; probate granted to profit-sharing members of limited liability partnership as consistent with testatrix's intention).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/20. Insolvent persons.

20. Insolvent persons.

The courts will not accept the disabilities recognised by the canon law on moral or religious grounds¹; nor will probate be refused solely on the ground of the executor's bankruptcy or insolvency². The courts of equity have assumed, however, the jurisdiction of restraining a

bankrupt executor from acting and of appointing a receiver³; if it is necessary to bring an action to recover any part of the estate, the court will compel the executor to allow his name to be used⁴. The jurisdiction is not exercised where the testator himself was at the time of making his will or later aware of the executor's financial position⁵. Where there is a solvent executor willing to act, the court will restrain the bankrupt executor from acting, but will refrain from appointing a receiver⁶. In view of this equitable jurisdiction it is thought that, even before the transfer of contentious probate business to the Chancery Division⁷, probate would have been refused in any case where a court of equity would have intervened⁸, and that probate would now be refused in such a case⁹.

1 *R v Raines* (1698) 1 Ld Raym 361.

2 *Hill v Mills* (1691) 1 Salk 36. See generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

3 As to the appointment of a receiver see PARA 218 post.

4 *R v Simpson* (1764) 1 Wm Bl 456; *Utterson v Mair* (1793) 2 Ves 95; *Gladdon v Stoneman* (1808) 1 Madd 143n (cited in *Howard v Papera* (1815) 1 Madd 142); *Re Hopkins*, *Dowd v Hawtin* (1881) 19 ChD 61, CA.

5 *Stainton v Carron Co* (1854) 18 Beav 146 at 161; *Langley v Hawk* (1820) 5 Madd 46.

6 *Bowen v Phillips* [1897] 1 Ch 174.

7 See PARA 74 post.

8 This would seem to have been the effect of the transfer to the High Court of the jurisdiction of the former courts of equity and probate by the Judicature Acts (see PARA 73 post; and COURTS) and of the deference shown to one division of the High Court by another. As to the relationship between the court to which probate jurisdiction is assigned and other divisions of the High Court see also PARAS 65-66, 74, 218, 236 post.

9 As to the court's discretion to make grants in special circumstances see PARA 181 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/21. Debtors.

21. Debtors.

The appointment of a debtor of the testator as executor releases the debt in law because the executor cannot sue himself¹. The effect is the same where the debtor is jointly, or jointly and severally liable with some other person². If the executor survives the testator but dies before proving the will or is cited to take out probate and does not appear or renounces probate, his rights in respect of the executorship wholly cease and the testator's estate devolves as if he had not been appointed executor³. In these cases there can therefore be no release of the debt⁴, but in any other case, for example where power is reserved to the executor to prove the will, the debt will be released at law⁵.

On the other hand, in equity the executor must account for the debt⁶ as assets of the estate available for payment both of creditors and of legatees⁷ unless he can prove that the testator clearly⁸ and continuously intended in his lifetime, and not by his will⁹, to forgive the debt¹⁰. The requirement by the testator of security for the debt after execution of the will appointing the debtor has been held to negative the intention to forgive¹¹.

Where the debtor-executor proves the will, he must be taken as having had the amount of the debt in his hands as assets from the testator's death; he cannot accordingly set up the lapse of

time between the death and the grant of probate to himself as a bar to the debt, and he is chargeable with interest from the date of death¹².

- 1 *Nedham's Case* (1610) 8 Co Rep 135a; and see *Re Pink, Pink v Pink* [1912] 2 Ch 528, CA. As to the statutory application of the rules set out in this paragraph on the appointment of a debtor administrator see PARA 33 post; and as to their statutory application where a debtor becomes his creditor's executor by representation see PARA 51 post. As to the release of the debt generally see CONTRACT vol 9(1) (Reissue) PARAS 1052-1053.
- 2 *Cheetham v Ward* (1797) 1 Bos & P 630; *Freakley v Fox* (1829) 9 B & C 130; *Jenkins v Jenkins* [1928] 2 KB 501; *Nicholson v Revill* (1836) 4 Ad & El 675 at 683; *North v Wakefield* (1849) 13 QB 536.
- 3 See the Administration of Estates Act 1925 s 5; and PARA 196 post.
- 4 The position at common law was otherwise: see *Wankford v Wankford* (1704) 1 Salk 299. See also the Court of Probate Act 1857 s 79; and the Court of Probate Act 1858 s 16 (both repealed, as to deaths after 1925, by the Administration of Estates Act 1925 s 56, Sch 2 Pt I).
- 5 *Re Applebee, Leveson v Beales* [1891] 3 Ch 422.
- 6 He must account whether the debt is secured or unsecured: *Re Greg, Fordham v Greg* [1921] 2 Ch 243.
- 7 *Carey v Goodinge* (1790) 3 Bro CC 110; *Berry v Usher* (1805) 11 Ves 87; *Stamp Duties Comr v Bone* [1977] AC 511, [1976] 2 All ER 354, PC. In equity the debt is discharged by payment at the date of probate: *Jenkins v Jenkins* [1928] 2 KB 501.
- 8 *Re Pink, Pink v Pink* [1912] 2 Ch 528, CA.
- 9 *Selwin v Brown* (1735) 3 Bro Parl Cas 607, HL, as explained by Stirling J in *Re Applebee, Leveson v Beales* [1891] 3 Ch 422 at 429-430.
- 10 *Strong v Bird* (1874) LR 18 Eq 315; *Re Applebee, Leveson v Beales* [1891] 3 Ch 422; *Re Goff, Featherstonhaugh v Murphy* (1914) 111 LT 34. See also *Re Hyslop, Hyslop v Chamberlain* [1894] 3 Ch 522; *Re Greg, Fordham v Greg* [1921] 2 Ch 243.
- 11 *Re Eiser's Will Trusts, Fogg v Eastwood* [1937] 1 All ER 244. It was also held in this case that the existence of the debt did not prevent the executors making payments for the debtor's maintenance from the income of the residuary estate of the testatrix which they held on discretionary trusts for a class including the debtor.
- 12 *Ingle v Richards (No 2)* (1860) 28 Beav 366.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(ii) Persons Eligible for Appointment/22. Donees of incomplete gifts.

22. Donees of incomplete gifts.

The appointment as an executor or administrator¹ of a person to whom the testator has during his lifetime attempted to make an immediate gift², whether of real or personal estate³, which, being incomplete, fails on technical considerations, is sufficient to perfect the gift⁴; but the principle is not to be extended to a case where the testator has merely announced an intention of making a gift at some future time⁵, or a case where the intention to make the gift did not continue until the testator's death⁶.

- 1 *Re James, James v James* [1935] Ch 449.
- 2 *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167.

3 *Re James, James v James* [1935] Ch 449.

4 *Strong v Bird* (1874) LR 18 Eq 315; *Re Stewart, Stewart v McLaughlin* [1908] 2 Ch 251. See also *Re Stoneham, Stoneham v Stoneham* [1919] 1 Ch 149. As to other types of gift from which such an incomplete gift is to be distinguished see PARA 340 post.

5 *Vavassey v Vavassey* (1909) 25 TLR 250; *Re Innes, Innes v Innes* [1910] 1 Ch 188; *Re Freeland, Jackson v Rodgers* [1952] Ch 110, [1952] 1 All ER 16, CA. As to incomplete gifts see GIFTS vol 52 (2009) PARA 267 et seq.

6 *Re Gonin, Gonin v Garmeson* [1979] Ch 16, [1977] 2 All ER 720.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(iii) Acceptance of the Office of Executor/23. Acceptance of office.

(iii) Acceptance of the Office of Executor

23. Acceptance of office.

The most obvious method of accepting the office of executor is for the person appointed to obtain a grant of probate¹, although the executor may, without applying for probate, do such acts with reference to the testator's estate as constitute an acceptance of the office. Acts which show an intention on the executor's part to take upon himself the office² or which would, in the case of a person not appointed executor, render that person liable as an executor de son tort³, constitute an acceptance. The release of a debt of the testator⁴, the application, even though unsuccessful, for the payment of money owing to the testator⁵, a statement, in answer to an inquiry by a creditor, that the will has been proved and that the person making the statement is one of the executors⁶, have been said to amount to an acceptance.

The mere performance of acts of charity or of necessity⁷ does not constitute an acceptance, and the executor may examine the testator's books to determine whether or not he is to accept the office without rendering himself liable to take probate⁸. He may open and operate an executorship account with a bank, allow insurance policies to be indorsed in his name, join in instructing solicitors, negotiate for a government grant for assets ordered by the testator and carry on the testator's farming business, all apparently without making a later renunciation of executorship ineffective⁹.

An application for probate, even if followed by the oath of office, does not prevent the executor from renouncing before the grant has actually passed the seal¹⁰. A person named as executor may act as the agent for a co-executor who has proved the will without rendering himself liable to account as an executor¹¹, even though he has not formally renounced¹².

1 A person cannot be compelled to accept the office, even though he has agreed to accept in the testator's lifetime: *Doyle v Blake* (1804) 2 Sch & Lef 231 at 239.

2 Bac Abr, Executors and Administrators (E) 10.

3 *Long and Feaver v Symes and Hannam* (1832) 3 Hag Ecc 771. As to the executor de son tort see PARA 53 et seq post.

4 *Went Off Ex* (14th Edn) 94; *Pytt v Fendall* (1754) 1 Lee 553.

5 *Re Stevens, Cooke v Stevens* [1897] 1 Ch 422; affd [1898] 1 Ch 162, CA.

6 *Vickers v Bell* (1864) 4 De GJ & Sm 274.

7 Shep Touch (7th Edn) 466; *Long and Feaver v Symes and Hannam* (1832) 3 Hag Ecc 771. As to what are acts of charity or necessity see PARA 55 post.

8 Godolphin's Orphan's Legacy (3rd Edn) Pt II, c 8 s 6. Taking possession of the testator's books of account may be sufficient to show an acceptance: *Clark v Phillips*, *Bayles v Phillips* (1854) 2 WR 331.

9 See *Holder v Holder* [1968] Ch 353 at 391-392, [1968] 1 All ER 665 at 671-672, CA, per Harman LJ, at 396-397 and 676-677 per Danckwerts LJ, and at 401 and 679-680 per Sachs LJ. In this case it had been conceded on behalf of the executor that his acts debarred him from renouncing, and the judgments of the Court of Appeal were obiter on this point.

10 *Jackson and Wallington v Whitehead* (1821) 3 Phillim 577; *M'Donnell v Prendergast* (1830) 3 Hag Ecc 212; *Mohamidu Mohideen Hadjar v Pitchey* [1894] AC 437, PC.

11 *Orr v Newton* (1791) 2 Cox Eq Cas 274, PC; *Dove v Everard* (1830) 1 Russ & M 231; *Rayner v Green* (1839) 2 Curt 248.

12 *Stacey v Elph* (1833) 1 My & K 195.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(iii) Acceptance of the Office of Executor/24. Executor who has accepted cannot renounce.

24. Executor who has accepted cannot renounce.

An executor who has once so acted as to show an intention of accepting the office cannot afterwards renounce¹; he may be cited to take probate² and be peremptorily ordered to do so³, but, in the court's discretion⁴, he may also be passed over⁵. He cannot discharge himself from his liability to account as executor by renouncing and paying his receipts to the executors who have proved⁶, nor can a scheme under the Companies Acts affect the rights, duties or powers of a corporate executor⁷.

1 *Rogers v Frank* (1827) 1 Y & J 409; *Long and Feaver v Symes and Hannam* (1832) 3 Hag Ecc 771; *Re Badenach* (1864) 3 Sw & Tr 465; *Re Stevens*, *Cooke v Stevens* [1897] 1 Ch 422; affd [1898] 1 Ch 162, CA; and see *Re Veiga* (1862) 3 Sw & Tr 13, where the executor had taken a grant. As to acts which amount to acceptance see PARA 23 ante. In *Re Fitzpatrick* (1892) 29 LR Ir 328 it was said that the court may, though perhaps it ought not to, accept the executor's refusal, notwithstanding he has administered; cf the text to notes 4-5 infra. As to actions against an executor before probate see PARA 32 post.

2 *Re Lister* (1894) 70 LT 812; *Re Coates* (1898) 78 LT 820. Committal will not be ordered against an executor for disobeying such a citation, unless there is served personally on him a copy on which is prominently displayed on the front a warning that disobedience to the order would be a contempt of court punishable by imprisonment (see CPR Sch 1 RSC Ord 45 r 7(4); *Re Bristow* (1891) 66 LT 60); but it is not clear whether such a citation is strictly within the terms of the rule (*Evans v Evans*) (1892) 67 LT 719). In practice the procedure now is to obtain from the registrar on summons an order (which should bear the penal notice) requiring the executor to take a grant or an order for a grant to the citor himself or some other person specified in the summons: see PARA 94 post. As to the CPR see PARA 37 note 3 post.

3 *Mordaunt v Clarke* (1868) LR 1 P & D 592. An executor may be summoned or cited to accept or refuse probate: see PARAS 85, 94, 96 post.

4 See PARAS 180-181 post.

5 *Re Biggs* [1966] P 118, [1966] 1 All ER 358.

6 *Read v Truelove* (1762) Amb 417. As to the liability of an executor to account see PARA 801 et seq post.

7 *Re Skinner* [1958] 3 All ER 273, [1958] 1 WLR 1043. See also COMPANIES vol 15 (2009) PARAS 1434, 1436.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(iii) Acceptance of the Office of Executor/25. Effect of acceptance.

25. Effect of acceptance.

An executor cannot accept in part and refuse in part: he must accept or refuse the office as a whole¹ or, where the appointment is limited, to the full extent of the appointment. In the case of certain settled land the personal representative may, however, before representation has been granted, renounce his office in regard only to the settled land without renouncing it in regard to other property; or he may, after representation has been granted, apply to the court for revocation of the grant in regard to the settled land without applying in regard to other property².

An executor of an executor who has accepted the executorship of the later testator cannot renounce the executorship of the earlier³.

The acceptance of the executorship involves the acceptance of the trusts which the testator himself may have imposed on his executors⁴, or which in a court of equity are considered to arise from the office⁵.

Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being, and are as effectual as if all the persons named as executors had concurred⁶.

1 Shep Touch (7th Edn) 466.

2 See the Administration of Estates Act 1925 s 23(1); and PARA 236 post. It would seem that 'settled land' here means land which continues to be settled after the death of the tenant for life: see *Re Bridgett and Hayes' Contract* [1928] Ch 163 at 169. See also PARA 234 note 2 post. As to special personal representatives in respect of settled land see PARA 229 post. As to the appointment of special or additional personal representatives in respect of settled land see PARA 236 post.

3 *Re Perry* (1840) 2 Curt 655; *Brooke v Haymes* (1868) LR 6 Eq 25; *Re Delacour* (1874) 9 IR Eq 86.

4 *Mucklow v Fuller* (1821) Jac 198; *Ward v Butler* (1824) 2 Mod 533; *Stiles v Guy* (1832) 4 Y & C Ex 571 at 575; *Re Sharman's Will Trusts, Public Trustee v Sharman* [1942] Ch 311 at 317, [1942] 2 All ER 74 at 78 (taking out probate involves acceptance of office of trustee of a will imposing trusts). In a loose sense an executor is a trustee for the creditors and beneficiaries, but he is not, as executor, necessarily a trustee (*Re Davis, Re Davis, Evans v Moore* [1891] 3 Ch 119 at 124, CA), although for purposes of administration he has inter alia the powers of trustees of land: see the Administration of Estates Act 1925 s 39 (as amended); and PARA 438 post. As to the principle that, when he has cleared the estate, a personal representative becomes a trustee of property remaining in his hands see PARAS 568-570 post.

5 *Re Marsden, Bowden v Layland, Gibbs v Layland* (1884) 26 ChD 783; *Re Sharman's Will Trusts, Public Trustee v Sharman* [1942] Ch 311, [1942] 2 All ER 74. See also PARA 5 ante.

6 Administration of Estates Act 1925 s 8(1), which applies whenever the testator died: s 8(2). The concurrence of all proving executors is required on a sale of land (both for the contract and the conveyance): see s 2(2) (as amended); and PARA 443 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(iv) Renunciation of the Office of Executor/26. Power to renounce.

(iv) Renunciation of the Office of Executor

26. Power to renounce.

A person appointed executor who has not acted so as to show an intention of accepting the office¹ and who does not wish to act may renounce the office, either personally or by power of attorney², and his renunciation need not be under seal³. The renunciation is not final until it is lodged and recorded in the proper court⁴. Therefore it does not become effective until filed⁵. The executor may renounce as soon as the testator is dead, and his renunciation can be filed, provided it is accompanied by the original will⁶.

1 As to the rule that an executor who has accepted cannot renounce see PARA 24 ante. As to acts which amount to acceptance see PARA 23 ante. As to the effect of acceptance see PARA 25 ante.

2 Toller's Law of Executors (7th Edn) 42; *Re Rosser* (1864) 3 Sw & Tr 490. As to settled land see PARA 25 ante.

3 *Re Boyle* (1864) 3 Sw & Tr 426.

4 *Re Morant* (1874) LR 3 P & D 151. The instrument of renunciation must be lodged in the principal registry, or a district probate registry.

5 *Re Morant* (1874) LR 3 P & D 151.

6 *Re Fenton* (1825) 3 Add 35. A person entitled to a grant of administration or administration with the will annexed may also renounce, but in such cases the renunciation does not bind the representatives of the renouncing party. An executor to whom power to prove has been reserved may renounce after probate has been granted to a co-executor. See generally Tristram and Coote's Probate Practice (28th Edn) 463-465.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(iv) Renunciation of the Office of Executor/27. Effect of renunciation.

27. Effect of renunciation.

Where a person renounces probate his rights in respect of the executorship wholly cease¹ and the representation² to the testator, and the administration³ of the estate, devolve and are to be committed in like manner as if that person had not been appointed executor⁴. Renunciation of probate by an executor does not operate as the renunciation of any right which he may have to a grant of administration in some other capacity unless he expressly renounces such right⁵. Unless a district judge⁶ or registrar⁷ otherwise directs⁸, no person who has renounced administration in one capacity may obtain a grant of it in some other capacity⁹, but a form of renunciation of probate by an executor must include renunciation of the right to administration in any other capacity in which he is entitled (for example as residuary legatee in trust) before a grant can be made to a person with a lower title¹⁰.

1 He cannot, however, insist on a formal release until the estate has been administered: *Tiger v Barclays Bank Ltd* [1951] 2 KB 556, [1951] 2 All ER 262; affd [1952] 1 All ER 85, CA. As to formal release see PARA 480 post.

2 For the meaning of 'representation' see PARA 4 note 2 ante.

3 For the meaning of 'administration' see PARA 3 note 1 ante.

4 Administration of Estates Act 1925 s 5(iii), replacing, as to deaths after 1925, the Court of Probate Act 1857 s 79 (repealed, except as to deaths before 1926). A similar statutory cessation of an executor's rights occurs: (1) where he survives the testator but dies before proving the will; and (2) where he is cited to take probate and does not appear: see PARAS 47, 87 post.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 37(1).

6 'District judge' means a district judge of the principal registry: *ibid* r 2(1) (definition added by SI 1991/1876).

7 In the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended), 'registrar' means the district probate registrar of the district probate registry: (1) to which an application for a grant is made or is proposed to be made; (2) in rr 26, 40, 41 and 61(2) (all as amended) (see PARAS 97, 168, 249, 263 post), from which a grant is issued; and (3) in rr 46, 47 and 48 (all as amended) (see PARAS 91-96 post), from which the citation has issued or is proposed to be issued: r 2(1) (definition substituted by SI 1991/1876). 'Grant' means a grant of probate or administration and includes, where the context so admits, the resealing of such a grant under the Colonial Probates Acts 1892 and 1927 (see PARA 245 post): Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1).

8 A direction may be made either by the registrar of the district probate registry in which the renunciation is filed or by a district judge: *ibid* r 37(4) (amended by SI 1991/1876).

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 37(2) (amended by SI 1991/1876). See also *Re Gill* (1873) LR 3 P & D 113; *Re Wheelwright* (1878) 3 PD 71; *Re Rayner* (1908) 52 Sol Jo 226; and see *Re Toscani* [1912] P 1, where a grant of administration de bonis non was made to a person as creditor who had previously renounced probate as an executor.

10 Cf the Non-Contentious Probate Rules 1987, SI 1987/2024, r 37(1); and the text to note 5 supra.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(iv) Renunciation of the Office of Executor/28. Withdrawal of renunciation.

28. Withdrawal of renunciation.

A renunciation of probate or administration may be retracted at any time with the leave¹ of a district judge or registrar². After filing, a renunciation cannot be retracted without an order³, and the renouncing executor must show that the retraction is for the benefit of the estate or of those interested under the will⁴. Retraction will not be allowed merely on the ground that the executor has changed his mind⁵. If a grant has been made to a person entitled in a lower degree, leave to an executor to retract his renunciation of probate may be granted only in exceptional circumstances⁶. An executor who is also the residuary legatee and has renounced in both capacities may, in special circumstances, be permitted to retract his renunciation in the capacity of residuary legatee⁷.

Where an executor who has renounced probate has been permitted to retract his renunciation and prove the will⁸, the probate takes effect and is deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other personal representative⁹ who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate must be indorsed on the original probate or letters of administration¹⁰.

1 An order giving leave may be made by either by the registrar of a district probate registry where the renunciation is filed or by a district judge: Non-Contentious Probate Rules 1987, SI 1987/2024, r 37(4) (amended

by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 37(3) (amended by SI 1991/1876). See also *Re Stiles* [1898] P 12 (proving executor absconded after probate; co-executor allowed to retract renunciation); *Re Thacker* [1900] P 15 (renunciation of right to administration by widow and children of bankrupt intestate; grant to official receiver; debts paid; grant to official receiver revoked; widow and children permitted to retract renunciation and grant made to them); *Re Heathcote* [1913] P 42 (death of wife intestate; renunciation by husband and grant to husband's trustee in bankruptcy; termination of bankruptcy; grant to trustee revoked; grant made to husband); cf *Re Badenach* (1864) 3 Sw & Tr 465 (renunciation invalid). Application for leave to retract is made ex parte: see PARA 99 post.

3 *Melville v Ancketill* (1909) 25 TLR 655, CA.

4 *Re Gill* (1873) LR 3 P & D 113. It seems that an executor will be permitted to retract his renunciation only for the purpose of obtaining a grant: *Re Whitham* (1866) LR 1 P & D 303 at 305.

5 *Re Gill* (1873) LR 3 P & D 113.

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 37(3) (as amended: see note 2 supra).

7 *Re Richardson* (1859) 1 Sw & Tr 515; *Re Morrison* (1861) 2 Sw & Tr 129; *Re Wheelwright* (1878) 3 PD 71. See also PARA 27 text and note 9 ante.

8 For the meaning of 'will' see PARA 3 note 1 ante.

9 For the meaning of 'personal representative' see PARA 4 ante.

10 Administration of Estates Act 1925 s 6.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(v) Executor's Acts before Grant/29. Source of executor's title.

(v) Executor's Acts before Grant

29. Source of executor's title.

The executor derives his title under the will¹, if he has been appointed executor by the will², but not if he has been appointed by the court under statutory powers³. His title under the will is aided in the case of real property by statute⁴, and the testator's property vests in him as from the date of death⁵ without any interval of time⁶. The probate itself is the authentication of his title⁷; but, if it affects the legal estate in land, it is also a document of title⁸.

1 *Comber's Case* (1721) 1 P Wms 766; *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603 at 608, PC. In the case of a foreign executor of a foreign domiciled testator where the law of wills and executors is similar to that of England, English law will recognise him as deriving title from the testator's will: see *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 1 (revsd on another point sub nom *Chappell & Co Ltd v Redwood Music Ltd* [1980] 2 All ER 817, HL) where an assignment was recognised as valid where it had been made by beneficiaries deriving title from executors under a Michigan will, the assignment being made before any grant of representation had been obtained in England (a grant in England was still necessary to prove the title, but the assignment was not void for want of entitlement at the time of the assignment).

2 It is not clear whether a special executor appointed or deemed to be appointed for settled land (see the Administration of Estates Act 1925 s 22; and PARA 229 post) derives any title under the will now that (with effect from 14 October 1991) administration is what is granted to him rather than probate: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29 (as substituted); and PARAS 230, 233 post. As to special executors see PARA 229 post.

3 For the court's power to appoint see the Supreme Court Act 1981 s 114(2) (see PARA 167 post); and the Administration of Estates Act 1925 s 23(2) (see PARA 236 post).

4 See *ibid* ss 1-3 (s 2 as amended) (see PARAS 363-366 post), which also apply to leaseholds. At common law these vest in the executor by virtue of his appointment: see generally paras 360, 363 et seq post. By the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 3, a will only operates in equity and therefore an executor does not obtain the legal estate in land under the will, but under the provisions of the Administration of Estates Act 1925 ss 1-3 (s 2 as amended). In practice an executor can only satisfactorily prove his title by production of probate: see the text to note 7 *infra*; and PARA 63 post.

As inheritance tax may have to be paid before the grant of probate or administration (see the Supreme Court Act 1981 s 109 (as amended); and PARA 131 post) and consequently before the deceased's bank account can be drawn on, it is usual for the banker to make a loan for this purpose on the representatives entering upon the required undertaking to be personally responsible. As to the payment of inheritance tax generally see INHERITANCE TAXATION vol 24 (Reissue) PARA 655 et seq.

5 *Woolley v Clark* (1822) 5 B & Ald 744. The estate is automatically divested if the executor renounces probate or survives the testator but dies without having proved the will or is cited to take out probate and does not appear: see PARAS 27 ante, 47, 85 post. It seems that the contents of an unproved will are not admissible in evidence, but evidence is admissible to show that the will exists without the necessity for proving it in proper form: see *Whitmore v Lambert* [1955] 2 All ER 147, [1955] 1 WLR 495, CA.

6 *Whitehead v Taylor* (1839) 10 Ad & El 210.

7 *Smith v Milles* (1786) 1 Term Rep 475 at 480; *Re Pawley and London and Provincial Bank* [1900] 1 Ch 58. Probate is in general necessary to establish the executor's title: see PARAS 31, 63 post.

8 This is the effect of the Administration of Estates Act 1925 s 36(5), requiring assents and conveyances by personal representatives to be indorsed on the probate: see *Re Miller and Pickersgill's Contract* [1931] 1 Ch 511; and PARA 567 post.

UPDATE

29 Source of executor's title

NOTES 3, 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(v) Executor's Acts before Grant/30. Acts done before probate.

30. Acts done before probate.

An executor may generally do before probate all things which pertain to the executorial office¹. He may pay or release debts², get in and receive the testator's estate³, assent to a legacy⁴, and generally intermeddle with the testator's goods⁵. He may distrain for rent⁶, demise⁷, grant a next presentation⁸ or release an action⁹. He may make a conveyance or assignment of personalty¹⁰ or of realty¹¹; but although before probate he can give a valid receipt for money payable upon an assignment, he cannot compel a purchaser to complete until after probate has been obtained¹². He may exercise the statutory power¹³ to appoint a new trustee of a trust of which the testator was the last surviving trustee, but his title to exercise the power can only be proved by a proper grant of representation¹⁴.

The acts of an executor who dies without obtaining probate hold good, provided the will is ultimately proved¹⁵.

- 1 See *Kelsey v Kelsey* (1922) 91 LJ Ch 382.
- 2 Went Off Ex (14th Edn) 81.
- 3 *Wills v Rich* (1742) 2 Atk 285.
- 4 Went Off Ex (14th Edn) 82; *Wankford v Wankford* (1704) 1 Salk 299 at 301; *Johnson v Warwick* (1856) 17 CB 516.
- 5 *Wankford v Wankford* (1704) 1 Salk 299 at 301. As to intermeddling see PARA 53 et seq post.
- 6 *Whitehead v Taylor* (1839) 10 Ad & El 210. As to distress generally see DISTRESS vol 13 (2007 Reissue) PARA 901 et seq.
- 7 *Roe d Bendall v Summerset* (1770) 2 Wm Bl 692. The power to demise ceases on the executor's assenting to a devise or bequest concerning that property in the will; cf *Doe d Saye and Lord Sele v Guy* (1802) 3 East 120.
- 8 *Smithley v Chomeley* (1556) 2 Dyer 135a. As to presentation generally see ECCLESIASTICAL LAW.
- 9 Went Off Ex (14th Edn) 81.
- 10 *Brazier v Hudson* (1836) 8 Sim 67 at 68.
- 11 See the Administration of Estates Act 1925 s 2(1) (see PARA 363 note 5 post), replacing the Land Transfer Act 1897 s 2(2), as respects deaths after 1925.
- 12 *Newton v Metropolitan Rly Co* (1861) 1 Drew & Sm 583. See also *Re Stevens, Cooke v Stevens* [1897] 1 Ch 422; affd [1898] 1 Ch 162, CA.
- 13 le under Trustee Act 1925 s 36(1): see TRUSTS vol 48 (2007 Reissue) PARA 835 et seq.
- 14 *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583.
- 15 Went Off Ex (14th Edn) 82; *Brazier v Hudson* (1836) 8 Sim 67; *Wankford v Wankford* (1704) 1 Salk 299 at 308; *Johnson v Warwick* (1856) 17 CB 516. Cf the Administration of Estates Act 1925 s 5(i); and PARA 47 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1.
 THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(v) Executor's Acts before Grant/31.
 Proceedings taken before probate.

31. Proceedings taken before probate.

As an executor derives his title from the will and not from the grant of probate¹ he may begin an action as executor before probate², but he cannot proceed beyond the stage at which it becomes necessary to prove his title³, as the only evidence of his title is the grant⁴. He may also present a petition in bankruptcy as executor of a deceased creditor⁵, or he may petition to wind up a limited company⁶ before probate.

Where a debtor does not dispute the debt but requires production of probate before making payment to the executor, the court can and will stay proceedings taken by the executor until production of probate⁷.

An executor can also in his personal capacity maintain an action in respect of property of which he has been in actual possession⁸, but when the possession is in dispute, he must prove his title as executor⁹.

- 1 *Re Pawley and London and Provincial Bank* [1900] 1 Ch 58.
- 2 As to proceedings by personal representatives generally see PARA 808 et seq post; and for proceedings against estates in the absence of a grant of probate or administration see PARAS 37, 226 post.
- 3 *Wankford v Wankford* (1704) 1 Salk 299 at 303; *Wills v Rich* (1742) 2 Atk 285; *Thompson v Reynolds* (1827) 3 C & P 123; *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603, PC; *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583. See also the Revenue Act 1884 s 11; and PARA 63 post. The stage at which the executor has to prove his title is as a rule the hearing: *Newton v Metropolitan Rly Co* (1861) 1 Drew & Sm 583; *Re Masonic and General Life Assurance Co* (1885) 32 ChD 373.
- 4 *R v Netherseal Inhabitants* (1791) 4 Term Rep 258 at 260; *Pinney v Hunt* (1877) 6 ChD 98.
- 5 *Rogers v James* (1816) 7 Taunt 147; *Re Drakeley, ex p Paddy* (1818) 3 Madd 241. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 139.
- 6 *Re Masonic and General Life Assurance Co* (1885) 32 ChD 373.
- 7 *Tarn v Commercial Bank of Sydney* (1884) 12 QBD 294, following *Webb v Adkins* (1854) 14 CB 401.
- 8 *Oughton v Seppings* (1830) 1 B & Ad 241.
- 9 *Pinney v Pinney* (1828) 8 B & C 335.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(2) THE EXECUTOR/(v) Executor's Acts before Grant/32. Executor's liability for acts done before probate.

32. Executor's liability for acts done before probate.

If an executor elects to act, he may be sued before probate, and cannot afterwards renounce¹; but the court will not allow an action to be brought against one appointed executor who has never meant to act, before he has had an opportunity of renouncing²; nor will it make an order for general administration in the absence of a duly constituted legal personal representative³.

- 1 *Webster v Webster* (1804) 10 Ves 93; *Blewitt v Blewitt* (1832) You 541; *Vickers v Bell* (1864) 4 De GJ & Sm 274; *Re Lovett, Ambler v Lindsay* (1876) 3 ChD 198. See also PARA 24 ante.
- 2 *Douglas v Forrest* (1828) 4 Bing 686 at 704.
- 3 *Penny v Watts* (1846) 2 Ph 149 at 152, 154; *Creasor v Robinson* (1851) 14 Beav 589; *Cary v Hills* (1872) LR 15 Eq 79; *Rowell v Morris* (1873) LR 17 Eq 20 (disapproving *Rayner v Koehler* (1872) LR 14 Eq 262, and *Cootte v Whittington* (1873) LR 16 Eq 534). See also *Dowdeswell v Dowdeswell* (1878) 9 ChD 294, CA. As to the appointment of a receiver pending grant see PARA 709 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(3) THE ADMINISTRATOR/(i) Administrator's Acts before Grant/33. Source of administrator's title.

(3) THE ADMINISTRATOR

(i) Administrator's Acts before Grant

33. Source of administrator's title.

The administrator derives his title entirely from the grant of letters of administration, and the deceased's property does not vest in him until the grant¹, so he cannot make a lease or other disposition before the grant². After the grant of administration the administrator has, subject to the limitations contained in the grant³, the same rights and liabilities and is accountable in the same way as if he were the executor of the deceased⁴.

Where a debtor becomes his deceased creditor's administrator his debt⁵ is then extinguished⁶, but he is accountable for the amount of the debt as part of the creditor's estate in any case where he would be so accountable if he had been appointed as an executor by the creditor's will⁷. This does not apply where the debtor's authority to act as administrator is limited to part only of the creditor's estate which does not include the debt; and a debtor whose debt is extinguished by becoming his creditor's administrator is not accountable for its amount where the debt was barred by limitation before he became the administrator⁸.

1 *Comber's Case* (1721) 1 P Wms 766; *Woolley v Clark* (1822) 5 B & Ald 744; *Creed v Creed* [1913] 1 IR 48.

2 *Wankford v Wankford* (1704) 1 Salk 299 at 308.

3 As to forms of limited grant see PARA 201 et seq post.

4 Administration of Estates Act 1925 s 21. For the meaning of 'administrator' see PARA 3 note 1 ante. As to the need for a grant whether of probate or administration see PARA 63 post.

5 'Debt' includes any liability, and 'debtor' and 'creditor' are to be construed accordingly: *ibid* s 21A(3) (s 21A added by the Limitation Amendment Act 1980 s 10).

6 Administration of Estates Act 1925 s 21A(1)(a) (as added: see note 5 supra).

7 *Ibid* s 21A(1)(b) (as added: see note 5 supra). For the meaning of 'will' see PARA 3 note 1 ante. As to the accountability of a debtor executor see PARA 21 ante. Before s 21A was added, the grant of administration to a debtor of the deceased did not release the debt, even at law; but the running of time was suspended while the debtor was administering the estate, so as to prevent the debt becoming statute-barred: *Seagram v Knight* (1867) 2 Ch App 628, CA.

8 Administration of Estates Act 1925 s 21A(2) (as added: see note 5 supra).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(3) THE ADMINISTRATOR/(i) Administrator's Acts before Grant/34. Vesting of property pending grant.

34. Vesting of property pending grant.

Where a person dies intestate, his real and personal estate vest in the Public Trustee until the grant of administration¹. Where a testator dies and at the time of his death there is no executor with power to obtain probate of the will², or at any time before probate of the will is granted there ceases to be any executor with power to obtain probate³, the real and personal estate of which he disposes by the will vests in the Public Trustee until the grant of representation⁴. This vesting of real or personal estate in the Public Trustee does not confer on him any beneficial interest in, or impose on him any duty, obligation or liability in respect of, the property⁵. A notice to quit served on the Public Trustee⁶ before a grant or on the persons in occupation as his agents⁷ is effective to determine a tenancy.

Any real or personal estate of a person dying before 1 July 1995 vested in the Public Trustee on that date if it was property which was vested in the President of the Family Division immediately before that date, or was not so vested but as at that date there had been no grant of representation in respect of it and there was no executor with power to obtain such a grant⁸. Anything done by or in relation to the President with respect to property vested in him immediately before 1 July 1995 is treated as having been done by or in relation to the Public Trustee⁹.

1 Administration of Estates Act 1925 s 9(1) (s 9 substituted by the Law of Property (Miscellaneous Provisions) Act 1994 s 14(1) with effect from 1 July 1995). For the meaning of 'real estate' see PARA 3 note 1 ante. As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq. The Administration of Estates Act 1925 s 9 (as originally enacted), in force from 1 January 1926 to 30 June 1995, vested the real and personal estate of a person who died intestate in the President of the Family Division, formerly the Probate, Divorce and Admiralty Division, of the High Court in the same manner and to the same extent as personal estate formerly vested in the Ordinary. Section 9 (as originally enacted) replaced the Court of Probate Act 1858 s 19 (repealed as to deaths after 1925), by virtue of which the personal estate and effects of a person dying intestate became vested in the judge of the Court of Probate for the time being. As to the vesting in the Ordinary of an intestate's personal estate see *Dyke v Walford* (1848) 5 Moo PCC 434. On the death of a person intestate before 1926, his real estate vested in the heir at law pending a grant of administration: *Re Griggs, ex p School Board for London* [1914] 2 Ch 547, CA; and see *John v John* [1898] 2 Ch 573 at 577, CA. See also *Re Deans, Westminster Bank Ltd v Official Solicitor* [1954] 1 All ER 496, [1954] 1 WLR 332, where it was held that the President was not a trustee for the purposes of the Trustee Act 1925 and had no duties.

2 Administration of Estates Act 1925 s 9(2)(a) (as substituted: see note 1 supra). For the meaning of 'will' see PARA 3 note 1 ante.

3 Ibid s 9(2)(b) (as substituted: see note 1 supra).

4 Ibid s 9(2) (as substituted: see note 1 supra).

5 Ibid s 9(3) (as substituted: see note 1 supra). See also *Re Deans, Westminster Bank Ltd v Official Solicitor* [1954] 1 All ER 496, [1954] 1 WLR 332.

6 The Public Trustee may give directions as to the office or offices at which documents may be served on him and must publish such directions in such manner as he considers appropriate: Law of Property (Miscellaneous Provisions) Act 1994 s 19(1). The Lord Chancellor may by regulations make provision with respect to the functions of the Public Trustee in relation to such documents; and the regulations may make different provision in relation to different descriptions of document or different circumstances: s 19(2). The regulations may, in particular, make provision requiring the Public Trustee: (1) to keep such documents for a specified period and after that period to keep a copy or record of their contents in such form as may be specified (s 19(3)(a)); (2) to keep such documents, copies and records available for inspection at such reasonable hours as may be specified (s 19(3)(b)); and (3) to supply copies to any person on request (s 19(3)(c)). 'Specified' means specified by or under the regulations: s 19(3). Regulations under s 19 must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 19(4). The Public Trustee Act 1906 ss 8(5) (payment of expenses out of money provided by Parliament), 9(1), (3) and (4) (provisions as to fees) (see TRUSTS vol 48 (2007 Reissue) PARA 790), apply in relation to the functions of the Public Trustee in relation to documents to which the Law of Property (Miscellaneous Provisions) Act 1994 s 19 applies as in relation to his functions under the Public Trustee Act 1906: Law of Property (Miscellaneous Provisions) Act 1994 s 19(5). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

See *Smith v Mather* [1948] 2 KB 212, [1948] 1 All ER 704, CA; *Fred Long & Son Ltd v Burgess* [1950] 1 KB 115, [1949] 2 All ER 484, CA; *Moodie v Hosegood* [1951] 2 All ER 582, HL. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 595 et seq. The notice to quit should be served direct on the Public Trustee at Public Trust Office, PO Box 3010, London WC2B 6JS: *Practice Direction* [1995] 3 All ER 192, [1995] 1 WLR 1120.

7 *Earl of Harrowby v Snelson* [1951] 1 All ER 140; *Rees d Mears v Perrot* (1830) 4 C & P 230; *Sweeny v Sweeny* (1876) IR 10 CL 375.

8 Law of Property (Miscellaneous Provisions) Act 1994 s 14(2), (3); Law of Property (Miscellaneous Provisions) Act 1994 (Commencement No 2) Order 1995, SI 1995/1317, art 2. Any property so vesting in the Public Trustee is treated as vesting in him under the Administration of Estates Act 1925 s 9(1) (as substituted) if the deceased died intestate, and as vesting under s 9(2) (as substituted) in any other case: Law of Property (Miscellaneous Provisions) Act 1994 s 14(4). As to the vesting of the intestate's estates in the President before 1 July 1995 see note 1 supra.

9 Ibid s 14(5). So far as necessary in consequence of the transfer to the Public Trustee of the functions of the Probate Judge any reference in an enactment or instrument to the Probate Judge is to be construed as a reference to the Public Trustee: s 14(6).

UPDATE

34 Vesting of property pending grant

NOTE 6--Reference to the 1906 Act s 9(4) omitted: 1994 Act s 19(5) (amended by the Public Trustee (Liability and Fees) Act 2002 s 2(4)).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(3) THE ADMINISTRATOR/(ii) The Doctrine of Relation Back/35. Relation back of administrator's title.

(ii) The Doctrine of Relation Back

35. Relation back of administrator's title.

In order to prevent injury being done to a deceased person's estate without remedy¹, the courts have adopted the doctrine that on the grant being made the administrator's title relates back to the time of death. This doctrine has been consistently applied in aid of an administrator seeking to recover against a person who has dealt wrongfully² with the deceased's chattels or chattels real³. It is also applicable against a person dealing wrongfully with the deceased's real estate⁴. It cannot be applied, however, to disturb the interests of other persons validly acquired in the interval, or to give the administrator title to something which has ceased to exist in the interval⁵, or to bind the administrator to an agreement made before the grant irrespective of its benefit to the estate⁶.

1 *Long v Hebb* (1652) Sty 341; *Waring v Dewberry* (1718) 1 Stra 97; *Mills v Anderson*[1984] QB 704, [1984] 2 All ER 538.

2 A person who intermeddles with an intestate estate without a grant may be an executor de son tort, for there is no such term as an administrator de son tort: see PARAS 2 ante, 53 et seq post.

3 *R v Horsley Inhabitants* (1807) 8 East 405; *Tharpe v Stallwood* (1843) 5 Man & G 760; *Foster v Bates* (1843) 12 M & W 226; *Barnett v Earl of Guildford*(1855) 11 Exch 19.

4 *Re Pryse*[1904] P 301, CA.

5 *Fred Long & Son Ltd v Burgess*[1950] 1 KB 115, [1949] 2 All ER 484, CA, where it was held that a tenancy was not revived by this doctrine.

6 *Doe d Hornby v Glenn* (1834) 1 Ad & El 49; *Metters v Brown* (1863) 1 H & C 686; *Mills v Anderson*[1984] QB 704, [1984] 2 All ER 538. See PARA 36 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(3) THE ADMINISTRATOR/(ii) The Doctrine of Relation Back/36. Validation of dispositions.

36. Validation of dispositions.

The doctrine of relation back¹ is also applied to render valid dispositions of the deceased's property made before the grant when it is shown that those dispositions are for the benefit of the estate², or have been made in due course of administration³. The disposition need not have been made by the person who ultimately obtains the grant, provided it is ratified by the administrator on obtaining the grant⁴. The doctrine does not apparently justify a distress for rent made before grant⁵.

Although, after grant, the administrator may enforce a contract entered into before grant⁶, he is not estopped in an action brought after grant from setting up his title of personal representative to defeat his own acts before grant⁷.

A promise to pay a debt made to a person assuming to act as administrator and who subsequently obtains letters of administration, will keep the debt alive in favour of the estate⁸.

1 See PARA 35 ante.

2 *Morgan v Thomas* (1853) 8 Exch 302 at 307 per Parke B. Whether dispositions made before the grant are for the benefit of the estate is to be judged objectively and in the light of relevant subsequent events, not subjectively according to what was perceived to be beneficial at the time: *Mills v Anderson* [1984] QB 704, [1984] 2 All ER 538.

3 *Whitehall v Squire* (1703) 1 Salk 295; *Ellis v Ellis* [1905] 1 Ch 613. See also *Hill v Curtis* (1865) LR 1 Eq 90 at 100 per Wood V-C.

4 *Foster v Bates* (1843) 12 M & W 226. Such ratification may not be necessary where a disposition has been made in pursuance of the duties conferred by the Administration of Estates Act 1925 on an executor de son tort; cf para 58 post. As to the executor de son tort see PARA 53 et seq post.

5 *Keane v Dee* (1821) Alc & N 496n. However, in the old action of ejectment it allowed a demise to be laid at a period anterior to the grant: *Patten v Patten* (1833) Alc & N 493.

6 *Foster v Bates* (1843) 12 M & W 226.

7 *Doe d Hornby v Glenn* (1834) 1 Ad & El 49; *Metters v Brown* (1863) 1 H & C 686; *Mills v Anderson* [1984] QB 704, [1984] 2 All ER 538.

8 *Bodger v Arch* (1854) 10 Exch 333; *Clark v Hooper* (1834) 10 Bing 480, as explained in *Stamford, Spalding and Boston Banking Co v Smith* [1892] 1 QB 765 at 769, CA. See also LIMITATION PERIODS vol 68 (2008) PARA 1203.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(3) THE ADMINISTRATOR/(ii) The Doctrine of Relation Back/37. Proceedings begun before grant.

37. Proceedings begun before grant.

The doctrine of the relation back¹ of an administrator's title to the intestate's property to the date of the intestate's death does not render competent a claim which was incompetent when the claim form was issued², but where a grant of letters of administration is obtained by the claimant after starting proceedings the court may allow an amendment to the claim form and particulars of claim so as to alter the capacity in which he claims to that of administrator of the intestate's estate³. A claim will lie against a person making claims on behalf of the intestate's estate who has not yet obtained a grant of administration⁴, and a claim can be brought against the estate of a deceased person where there has been no grant of representation⁵. A creditor or

person beneficially interested in an estate may make an application for the appointment of an administrator pending suit⁶, and a notice to quit can be validly given to persons in occupation before the issue of a grant, on the ground that those persons are agents of the Public Trustee⁷.

The doctrine of relation back also applies for the purposes of the statutory provisions limiting the time for bringing claims to recover land or advowsons; the administrator is deemed to claim as if there had been no interval of time between the death and the grant of administration⁸.

1 See PARA 35 ante.

2 See *Ingall v Moran* [1944] KB 160, [1944] 1 All ER 97, CA; *Hilton v Sutton Steam Laundry* [1946] KB 65, [1945] 2 All ER 425, CA; *Finnegan v Cementation Co Ltd* [1953] 1 QB 688, [1953] 1 All ER 1130, CA. See also *Stebbins v Holst & Co Ltd* [1953] 1 All ER 925, [1953] 1 WLR 603; *Bowler v John Mowlem & Co Ltd* [1954] 3 All ER 556, [1954] 1 WLR 1445, CA.

3 Ie by virtue of CPR 17.4(4): see CIVIL PROCEDURE.

As from 26 April 1999, the Civil Procedure Rules (CPR) replace the Rules of the Supreme Court and the County Court Rules. Certain provisions of the RSC and CCR are saved in a modified form in CPR Schs 1 and 2 respectively. The CPR apply to proceedings issued on or after 26 April 1999, and new steps taken in existing proceedings, as prescribed: CPR Pt 51; *Practice Direction--Transitional Arrangements* (1999) PD 51.

The CPR have the overriding objective of enabling the court to deal with cases justly: CPR 1.1(1). Dealing with a case justly includes, so far as is practicable, (1) ensuring that the parties are on an equal footing; (2) saving expense; (3) dealing with the case in ways which are proportionate (a) to the amount of money involved, (b) to the importance of the case, (c) to the complexity of the issues, and (d) to the financial position of each party; (4) ensuring that it is dealt with expeditiously and fairly; and (5) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases: CPR 1.1(2). The court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules, or interprets any rule: CPR 1.2. The parties are required to help the court to further the overriding objective: CPR 1.3. The court must also further the overriding objective by actively managing cases: CPR 1.4(1). Active case management includes (i) encouraging the parties to co-operate with each other in the conduct of the proceedings; (ii) identifying the issues at an early stage; (iii) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (iv) deciding the order in which issues are to be resolved; (v) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure; (vi) helping the parties to settle the whole or part of the case; (vii) fixing timetables or otherwise controlling the progress of the case; (viii) considering whether the likely benefits of taking a particular step justify the cost of taking it; (ix) dealing with as many aspects of the case as it can on the same occasion; (x) dealing with the case without the parties needing to attend at court; (xi) making use of technology; and (xii) giving directions to ensure that the trial of a case proceeds quickly and efficiently: CPR 1.4(2).

In relation to proceedings to which the CPR apply, changes of terminology are introduced. Claims are now brought instead of actions, and, accordingly, a person instituting proceedings is now known as a claimant rather than a plaintiff. A claimant generally commences proceedings by way of a 'claim form', which may include his particulars of claim. Pleadings are now known as 'statements of case', and that term embraces the claim form. Leave of the court is now referred to as 'permission of the court'. Where former terms appear in existing enactments which have not been amended in the light of the new regime, they should nonetheless be read in that light. As to proceedings to which the CPR apply see CPR Pts 2, 49, 51.

In the light of the overriding objective, the court, in deciding how a case ought to proceed, must apply principles under the CPR and not under the previous regime of RSC or CCR: see *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, [1999] 1 WLR 1926, CA. Earlier authorities on matters of civil procedure (even where the provisions in question in the CPR are identically worded to those under the RSC or CCR) are therefore not necessarily applicable in interpreting the new rules: see *Natwest Lombard Factors Ltd v Arbis* (1999) Times, 10 December. Accordingly, cases cited in this title in amplification or explanation of the former rules will be binding over proceedings conducted under those rules, but should be viewed with caution in relation to proceedings conducted under the new regime.

4 *Loudon v Ryder (No 2)* [1953] Ch 423, [1953] 1 All ER 1005.

5 CPR Sch 1 RSC Ord 15 r 6A(1); CPR Sch 2 CCR Ord 5 r 8(1). See also PARA 226 post. The claimant must apply during the validity for service of the claim form either to have a person appointed to represent the estate in the proceedings or to join the deceased's personal representatives if by then there are some: see CPR Sch 1 RSC Ord 15 r 6A(4); CPR Sch 2 CCR Ord 5 r 8(4). Where there has been no grant and either of these provisions applies, any judgment or order in the proceedings binds the estate: CPR Sch 1 RSC Ord 15 r 6A(7); CPR Sch 2 CCR Ord 5 r 8(7). See also PARA 226 post.

- 6 See PARA 218 post. As to grants pendente lite see PARA 216 post.
- 7 See PARA 34 ante. As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq.
- 8 See the Limitation Act 1980 s 26; and LIMITATION PERIODS vol 68 (2008) PARA 923.

UPDATE

37 Proceedings begun before grant

NOTE 5--CPR Sch 1 RSC Ord 15 r 6A, Sch 2 CCR Ord 5 r 8 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/38. General principle.

(4) PERSONAL REPRESENTATIVES' REMUNERATION

38. General principle.

The general principle is that a personal representative must act gratuitously. He is not entitled to any remuneration¹ and he must not make a profit from his office². This principle is subject to two exceptions, namely where the will itself directs remuneration³ and where the court allows it⁴. It is increasingly common for wills to provide for the remuneration of executors in professional practice⁵ and of trust corporations⁶.

- 1 See PARA 39 post.
- 2 See PARA 45 post.
- 3 See PARA 43 post.
- 4 See PARA 44 post.
- 5 As to the application to executors in professional practice of the general principle that an executor must act gratuitously see PARA 40 post.
- 6 See PARA 43 post. As to the higher standards required of a paid trustee see PARA 795 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/39. Time and trouble.

39. Time and trouble.

Apart from the two exceptions previously mentioned¹, the personal representative is not entitled to any allowance for his time and trouble in transacting business as an English personal representative in relation to English estate²; he is entitled to his out-of-pocket expenses only³. Accordingly, he cannot claim commission for collecting rents⁴, or for acting as auctioneer⁵ or

banker⁶, and where he is at once the deceased's partner and executor he cannot claim an allowance for carrying on the business⁷.

1 See PARA 38 ante.

2 *Re Northcote's Will Trusts, Northcote v Northcote* [1949] 1 All ER 442. He is not obliged in equity to account for remuneration received in respect of a foreign grant of representation: *Re Northcote's Will Trusts, Northcote v Northcote* supra.

3 *Robinson v Pett* (1734) 3 P Wms 249; *Brocksope v Barnes* (1820) 5 Madd 90; *Broughton v Broughton* (1855) 5 De GM & G 160 at 164; *Re Barber, Burgess v Vinicome* (1886) 34 ChD 77 at 80.

4 *Nicholson v Tutin (No 2)* (1857) 3 K & J 159.

5 *Kirkman v Booth* (1848) 11 Beav 273.

6 *Heighington v Grant* (1840) 5 My & Cr 258 at 262; *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054.

7 *Burden v Burden* (1813) 1 Ves & B 170; *Stocken v Dawson* (1843) 6 Beav 371. As to when a director who is also a trustee may retain remuneration received by him see eg *Re Llewellyn's Will Trusts, Griffiths v Wilcox* [1949] Ch 225, [1949] 1 All ER 487; and TRUSTS vol 48 (2007 Reissue) PARA 928.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/40. Executor in professional practice.

40. Executor in professional practice.

The rule that the representative is not entitled to any allowance for his time and trouble¹ applies in particular to the case of a solicitor representative². In the absence of a special clause³ in the will authorising him to charge for professional services, he is only entitled to out-of-pocket expenses, and not to profit costs for work done out of court, whether acting for himself or for the body of executors⁴.

If a solicitor-representative employs and acts by the firm of which he is a partner, profit costs cannot be allowed⁵ even though it is proved to be the firm's practice to arrange that the profit costs should be taken by the members of the firm other than the solicitor-representative⁶, or that all the business may have been transacted by such other members⁷. If, however, the solicitor-representative employs, not his firm as such, but the other members of the firm, and there is an express agreement that the solicitor-representative is not to participate in the profits to be derived from the business connected with the estate, profit costs may be allowed to the other members of the firm⁸.

Should the representative in disregard of this rule have received any profit costs he must account for them to the estate, even though they were not earned at its expense. Accordingly he must refund the profit costs received by him in preparing a lease, even though the costs were paid by the lessee⁹, and he must refund commission received by him on the introduction of business connected with the trust¹⁰.

Although the solicitor-representative is the commonest instance of the executor in professional practice, other professional persons are frequently appointed as executors, and similar principles in relation to charges for services apply to them and to businessmen who are appointed as executors.

1 See PARA 39 ante.

2 *Re Worthington, ex p Leighton v MacLeod* [1954] 1 All ER 677, [1954] 1 WLR 526. As regards the inherent jurisdiction to allow remuneration cf para 44 post; as to the duty of a trustee to act gratuitously see TRUSTS vol 48 (2007 Reissue) PARA 930 et seq; and as to the position and charges of a solicitor-trustee see LEGAL PROFESSIONS vol 66 (2009) PARA 811 et seq.

3 See PARA 43 post. As to legacies to executors see PARA 490 post.

4 *Lincoln v Windsor* (1851) 9 Hare 158; *Broughton v Broughton* (1855) 5 De GM & G 160; *Re Barber, Burgess v Vinicome* (1886) 34 ChD 77; *D'Arcy v O'Kelly* (1921) 55 ILT 48.

5 *Matthison v Clarke* (1854) 3 Drew 3. However, as to costs of litigation see PARA 41 text to note 2 post.

6 *Re Gates, Arnold v Gates* [1933] Ch 913; and see *Collins v Carey* (1839) 2 Beav 128; *Re Hill, Claremont v Hill* [1934] Ch 623, CA.

7 *Christophers v White* (1847) 10 Beav 523.

8 *Clack v Carlon* (1861) 30 LJ Ch 639; *Re Doody, Fisher v Doody, Hibbert v Lloyd* [1893] 1 Ch 129 at 134, CA.

9 *Re Corsellis, Lawton v Elwes* (1887) 34 ChD 675, CA.

10 *Vipont v Butler* [1893] WN 64.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/41. Litigation costs.

41. Litigation costs.

The rule that a solicitor-representative is not entitled to an allowance for time and trouble¹ applies where the solicitor does business in court acting for himself as solicitor, whether he is claimant or defendant in the action². There is, however, one exception to this rule: where the solicitor has acted in proceedings, whether of a hostile nature or not, not only on his own behalf but also on behalf of his co-representatives, he will not be prevented from receiving the usual costs, so far as he has not himself added to the expense which would have been incurred if he had appeared only for them³.

Where a solicitor-executor practises in the provinces and employs a London agent to act in litigation in which the estate is concerned, he is entitled to pay and to be allowed out of the estate his share of the profit costs receivable by the town agent⁴.

1 See PARA 39 ante.

2 *Re Barber, Burgess v Vinicome* (1886) 34 ChD 77 at 81 per Chitty J.

3 *Craddock v Piper* (1850) 1 Mac & G 664, followed in *Re Barber, Burgess v Vinicome* (1886) 34 ChD 77; *Re Corsellis, Lawton v Elwes* (1887) 34 ChD 675, CA; *Re Doody, Fisher v Doody, Hibbert v Lloyd* [1893] 1 Ch 129 at 134, CA. *Bainbrigge v Blair* (1845) 8 Beav 588 must be treated as overruled: see *Re Barber, Burgess v Vinicome* supra at 83 per Chitty J.

4 *Burge v Brutton* (1843) 2 Hare 373.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/42. Costs allowed when acting for beneficiary.

42. Costs allowed when acting for beneficiary.

A solicitor-representative may act as solicitor for a beneficiary in a claim relating to the estate, because that is not part of the business of the trust properly so called, and if his beneficiary obtains his costs out of the estate, the solicitor is not deprived of those costs¹; but he should not act for a party who occupies an adverse position to the estate, and if he does so he will be disallowed his profit costs².

1 *Re Barber, Burgess v Vinicome* (1886) 34 ChD 77 at 81.

2 *Re Corsellis, Lawton v Elwes* (1887) 34 ChD 675, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/43. Direction in will for remuneration.

43. Direction in will for remuneration.

A testator may of course by his will authorise his executor or the executor's firm to be paid for professional work¹, or for work which an ordinary lay executor could have done in person without the assistance of a professional²; but to entitle a solicitor to the latter charges there must be clear words in the will³: a direction that he should be paid all usual professional charges is not sufficient⁴.

An authority to a professional executor to make professional charges is a legacy, which will fail if the executor has attested the will⁵, and any charges made will be repayable if the will subsequently turns out to be invalid⁶. Such an authority will not be effective where the estate is insolvent⁷.

A clause authorising the remuneration of an executor in professional practice has been held to indicate a sufficient intention to remunerate a trust corporation subsequently appointed by codicil⁸. A professional trustee charging clause has been held not to authorise a trust corporation to charge⁹.

1 *Re Sherwood* (1840) 3 Beav 338 at 341; *Re Wertheimer, Groves v Read* (1912) 106 LT 590. In *Re Orwell's Will Trusts, Dixon v Blair* [1982] 3 All ER 177, [1982] 1 WLR 1337 it was held in the case of a clause authorising 'any trustee' to charge for work done by him or his firm that it authorised charging for work done by a literary executor and for work done by a private company which was equivalent to a partnership of the literary executor.

2 See *Re Ames, Ames v Taylor* (1883) 25 ChD 72; *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA. See also *Willis v Kibble* (1839) 1 Beav 559.

3 *Re Chalinder and Herington* [1907] 1 Ch 58.

4 *Re Chapple, Newton v Chapman* (1884) 27 ChD 584. See also *Clarkson v Robinson* [1900] 2 Ch 722, where it was held that an authority to charge for all professional services, whether in the ordinary course of the executor's profession or not, did not authorise a charge for work done outside the executor's profession.

5 *Re Barber, Burgess v Vinnicome* (1886) 31 ChD 665; *Re Pooley* (1888) 40 ChD 1, CA; *Re Thorley, Thorley v Massam* [1891] 2 Ch 613, CA; *Re Brown, Wace v Smith* [1918] WN 118; *New South Wales Stamp Duties Comr v Pearse* [1954] AC 91 at 113, [1954] 1 All ER 19 at 28, PC. As to legacies to executors see PARA 490 post.

6 *Gray v Richards Butler* (1996) Times, 23 July.

7 *Re White, Pennell v Franklin* [1898] 2 Ch 217, CA; *Re Shuttleworth, Lilley v Moore* (1911) 55 Sol Jo 366; *Re Salmen, Salmen v Bernstein* (1912) 107 LT 108, CA; *Re Worthington, ex p Leighton v MacLeod* [1954] 1 All ER 677, [1954] 1 WLR 526.

8 *Re Campbell* [1954] 1 All ER 448, [1954] 1 WLR 516.

9 *Re Cooper, Le Neve-Foster v National Provincial Bank* as reported in (1939) 160 LTR 453. No reasons were given in the decision, and no attention was paid to the Law of Property Act 1925 s 61(b) ('person' in a written instrument includes a corporation unless the context otherwise requires).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/44. Court's power to allow remuneration.

44. Court's power to allow remuneration.

The court has statutory jurisdiction to allow remuneration to a personal representative who is a judicial trustee¹, or to a person appointed by the court as a substituted personal representative², or on a grant of letters of administration to a trust corporation³. There is also an inherent jurisdiction to allow remuneration whether the personal representative or trustee is appointed by the court or not⁴, and to allow increased remuneration to a personal representative or trustee who is already authorised to charge⁵, but this jurisdiction has been said to be one which is exercised sparingly and only in exceptional cases⁶.

Fees are also payable where the Public Trustee acts as personal representative⁷.

1 See the Judicial Trustees Act 1896 s 1(5); the Judicial Trustee Rules 1983, SI 1983/370, r 11; and TRUSTS vol 48 (2007 Reissue) PARA 764. See also *Re Ratcliff* [1898] 2 Ch 352.

2 See the Administration of Justice Act 1985 s 50(3); and PARA 706 post.

3 See the Trustee Act 1925 ss 42, 68(1) PARA (17); and TRUSTS vol 48 (2007 Reissue) PARAS 603, 801. See also *Re Young* (1934) 103 LJP 75.

4 *Re Masters, Coutts & Co v Masters* [1953] 1 All ER 19, [1953] 1 WLR 81; and see *Marshall v Holloway* (1820) 2 Swan 432; *Forster v Ridley* (1864) 4 De GJ & Sm 452; *Re Freeman's Settlement Trusts* (1887) 37 ChD 148. The court's inherent jurisdiction may be exercised so as to allow trustees to retain directors' fees: see *Re Macadam, Dallow v Codd* [1946] Ch 73 at 82-83, [1945] 2 All ER 664 at 672 per Cohen J; *Re Masters, Coutts & Co v Masters* supra at 20 and 83 per Danckwerts J; *Re Worthington, ex p Leighton v Macleod* [1954] 1 All ER 677 at 679, [1954] 1 WLR 526 at 528 per Upjohn J.

5 *Re Duke of Norfolk's Settlement Trusts, Perth (Earl) v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA.

6 *Re Worthington, ex p Leighton v MacLeod* [1954] 1 All ER 677, [1954] 1 WLR 526. It is not clear how far this dictum is superseded by *Re Duke of Norfolk's Settlement Trusts, Perth (Earl) v Fitzalan-Howard* [1982] Ch 61 at 79, [1981] 3 All ER 220 at 230-231, CA, per Fox LJ. See also *Re Barbour's Settlement, National Westminster Bank v Barbour* [1974] 1 All ER 1188 at 1192, [1974] 1 WLR 1198 at 1202-1203 per Megarry J (inflation could be a relevant factor even though general rather than exceptional). The court is unlikely to authorise remuneration of a personal representative where the estate is insolvent: *Re White* [1898] 1 Ch 297 (affd [1898] 2 Ch 217, CA); *Re Salmen, Salmen v Bernstein* (1912) 107 LT 108; *Re Duke of Norfolk's Settlement Trusts, Perth (Earl) v Fitzalan-Howard* supra at 77 and 229 per Fox LJ.

⁷ See the Public Trustee Act 1906 s 9 (as amended); the Public Trustee (Fees) Order 1999 SI 1999/855; and TRUSTS vol 48 (2007 Reissue) PARA 790.

UPDATE

44 Court's power to allow remuneration

NOTE 7--SI 1999/855 replaced: Public Trustee (Fees) Order 2008, SI 2008/611.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/45. Representative may make no profit.

45. Representative may make no profit.

It is an imperative rule of the court that a person with fiduciary duties may not derive any pecuniary benefit from his office¹. Accordingly a personal representative must account to the estate for all profit derived from the trust property or from his office² as an English personal representative but not for profit derived from foreign assets received in respect of a foreign grant³. If he directly or indirectly purchases trust property the transaction is voidable within a reasonable time⁴ at the instance of a beneficiary⁵; and an executor who renews a lease⁶, who purchases the reversion of a lease which is renewable by contract or by custom⁷, or who purchases the equity of redemption of a mortgage vested in him as executor⁸, will be taken to have done so for the benefit of the estate. Similarly, he cannot buy debts due to the estate⁹ or legacies¹⁰ at less than their full amount, he cannot as trustee permit the assignment of a non-assignable tenancy to a company in which he is a director and major shareholder¹¹, and may not exercise a power of appropriation to appropriate assets of the estate in satisfaction of his own entitlement under a will or intestacy unless the assets are equivalent to cash¹².

The disability to purchase does not extend to an executor who has renounced the executorship¹³. An executor who has acted as such, however, cannot ordinarily¹⁴ avoid the disability by ceasing to act or by retiring from the trusts of the testator's will with a view to enabling himself to purchase¹⁵.

An executor who, in the course of carrying on the testator's business, supplies goods to that business from his own must, in the absence of an express authority in the will, account for all profits made by the transaction¹⁶.

All these transactions may, however, be carried out by order of the court¹⁷, or when they are authorised by the terms of the will if there is one¹⁸, and in practice are commonly carried out without an order if all the beneficiaries, being of full age and free from disability and between them absolutely entitled, concur in the transaction in question¹⁹.

¹ *Crosskill v Bower, Bower v Turner* (1863) 32 Beav 86 at 98-99. See TRUSTS vol 48 (2007 Reissue) PARA 1109.

² *Sugden v Crossland* (1856) 3 Sm & G 192, where an executor-trustee who had accepted a sum of money to retire from his office was ordered to refund. See TRUSTS vol 48 (2007 Reissue) PARA 1109.

³ *Re Northcote's Will Trusts, Northcote v Northcote* [1949] 1 All ER 442.

⁴ See *Re Jarvis, Edge v Jarvis* [1958] 2 All ER 336, [1958] 1 WLR 815 (six years' delay in seeking remedy against executor who carried on testator's business without authority; relief not granted).

- 5 *Hall v Hallet* (1784) 1 Cox Eq Cas 134; *Holder v Holder* [1968] Ch 353 at 398, [1968] 1 All ER 665 at 677, CA, per Danckwerts LJ.
- 6 *Keech v Sandford* (1726) Cas temp King 61; *Kelly v Kelly* (1874) 8 IR Eq 403; *Re Biss, Biss v Biss* [1903] 2 Ch 40 at 61, CA; *Brady v Brady* [1920] 1 IR 170, CA.
- 7 See *Phillips v Phillips* (1885) 29 ChD 673, CA. In the absence of fraud the disability does not apply where the lease is not so renewable: *Longton v Wilsby* (1897) 76 LT 770; *Bevan v Webb* [1905] 1 Ch 620. See also *Randall v Russell* (1817) 3 Mer 190. These cases were not cited in *Protheroe v Protheroe* [1968] 1 All ER 1111, [1968] 1 WLR 519, CA.
- 8 *Fosbrooke v Balguy* (1833) 1 My & K 226.
- 9 *Anon* (1707) 1 Salk 155; *Ex p James* (1803) 8 Ves 337 at 346.
- 10 *Barton v Hassard* (1843) 3 Dr & War 461. The purchase will be set aside in favour of the legatees who sold their interests; it will not operate as a release of the estate so as to enure for the benefit of the co-legatees: *Barton v Hassard* supra.
- 11 *Re Thompson's Settlement, Thompson v Thompson* [1986] Ch 99, [1985] 2 All ER 720.
- 12 *Kane v Radley-Kane* [1999] Ch 274, [1998] 3 All ER 753. As to powers of appropriation see PARA 573 et seq post. It seems that the rule against self-dealing may also affect the exercise of a power of appointment or other dispositive power where a person who is both an object of the power and a trustee exercises the power in his own favour: see *Re Edward's Will Trusts, Dalglish v Leighton* [1947] 2 All ER 521 (revsd on other grounds [1948] Ch 440, [1948] 1 All ER 821); *Re Beatty's Will Trusts, Hinvies v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503; *Re William Makin & Sons Ltd* [1993] BCC 453; *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32; *Edge v Pensions Ombudsman* [1998] Ch 512, [1998] 2 All ER 547 (affd on other grounds [1999] 4 All ER 546, CA).
- 13 See PARA 449 post.
- 14 Where, before he purported to renounce, an executor had performed minor and technical acts of intermeddling with the estate but had not afterwards taken any part in administration and the beneficiaries had not relied on him to protect their interests, a purchase by him of property belonging to the estate was held in the special circumstances of the case to be valid, even on the assumption that the renunciation was ineffective: *Holder v Holder* [1968] Ch 353, [1968] 1 All ER 655, CA. See further PARA 23 note 9 ante.
- 15 See *Ex p James* (1803) 8 Ves 337 at 352; *Re Boles and British Land Co's Contract* [1902] 1 Ch 244 at 246. Where, however, a person had retired from the trusteeship 12 years before the contract it was held that he could purchase trust property: *Re Boles and British Land Co's Contract* supra. See further TRUSTS vol 48 (2007) PARA 938.
- 16 *Re Sykes, Sykes v Sykes* [1909] 2 Ch 241, CA, overruling *Smith v Langford* (1840) 2 Beav 362.
- 17 *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32. As to the High Court's power to make an order approving any sale, purchase, compromise or other transaction by a personal representative see PARA 714 post.
- 18 The authorisation can be express, or implied, eg where a person by being appointed as an executor is put in a position of conflict of interest: *Sargeant v National Westminster Bank plc* (1991) 61 P & CR 518, CA. See also *Edge v Pensions Ombudsman* [1998] Ch 512, [1998] 2 All ER 547.
- 19 As to the necessity for independent advice for young persons who have just obtained their majority in order to negative any presumption of undue influence which may arise see eg *Powell v Powell* [1900] 1 Ch 243.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1.
 THE OFFICE OF REPRESENTATIVE/(4) PERSONAL REPRESENTATIVES' REMUNERATION/46.
 Employment of assets in representative's own business.

46. Employment of assets in representative's own business.

A representative who employs assets of the estate in his own business is liable to account¹, at the option of the beneficiaries, either for the profits actually made or for interest on the sum employed², unless on its true construction the will authorises the representative to make such profits³. Where the representative has mixed the assets with his own money and has employed both in his trade, the beneficiaries, if they elect to take the profits instead of interest, can only insist on the proportionate share attributable to the employment⁴.

Where the beneficiaries elect to claim interest, the principle on which the court proceeds is not to visit the representative with compound interest by way of punishment, but to charge him with the interest he has in fact received, or which it is just to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it⁵. Where the money has been employed in an ordinary trade the court presumes that the party against whom relief is sought has made the amount of profit which persons ordinarily do make in trade, and in that case directs compound interest⁶. In the case of a solicitor's business it is not to be presumed that compound interest could have been made⁷. The ordinary mercantile rate of interest has in the past been taken as 5 per cent⁸, but the courts now tend to be guided by the percentages under the rules of court governing interest on judgment debts⁹.

1 As to the general liability to account (eg for unauthorised payments or investments etc) see PARA 801 post.

2 *Docker v Somes* (1834) 2 My & K 655; *Wedderburn v Wedderburn* (1838) 4 My & Cr 41; *Jones v Foxall* (1852) 15 Beav 388; *Macdonald v Richardson*, *Richardson v Marten* (1858) 1 Giff 81; *Townend v Townend* (1859) 1 Giff 201; *Vyse v Foster* (1872) 8 Ch App 309 at 329 (affd (1874) LR 7 HL 318); *Re Davis*, *Davis v Davis* [1902] 2 Ch 314.

3 *Re Waterman's Will Trusts*, *Lloyd Bank Ltd v Sutton* [1952] 2 All ER 1054.

4 *Docker v Somes* (1834) 2 My & K 655; *Wedderburn v Wedderburn* (1838) 4 My & Cr 41.

5 *A-G v Alford* (1855) 4 De GM & G 843 at 851; *Burdick v Garrick* (1870) 5 Ch App 233 at 241. See also *Re Waterman's Will Trusts*, *Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054. As to estoppel generally see ESTOPPEL.

6 See *Burdick v Garrick* (1870) 5 Ch App 233 at 242; and *Tebbs v Carpenter* (1816) 1 Madd 290; *Walker v Woodward* (1826) 1 Russ 107; *Jones v Foxall* (1852) 15 Beav 388; *Williams v Powell* (1852) 15 Beav 461; *Walrond v Walrond* (1861) 29 Beav 586; but cf *A-G v Solly* (1829) 2 Sim 518.

7 *Burdick v Garrick* (1870) 5 Ch App 233 at 241.

8 *Vyse v Foster* (1872) 8 Ch App 309 at 329 (on appeal (1874) LR 7 HL 318); *Re Davis*, *Davis v Davis* [1902] 2 Ch 314; *Re Waterman's Will Trusts*, *Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054.

9 See CIVIL PROCEDURE.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(5) THE CHAIN OF REPRESENTATION/(i) Devolution on Death/47. Devolution of office.

(5) THE CHAIN OF REPRESENTATION

(i) Devolution on Death

47. Devolution of office.

An executorship cannot be assigned at common law because it is an office of personal trust¹. It can only devolve by operation of law. On the death of one of several representatives, the office, with its incidents, duties and powers, and the estate and interest in all the property vested in the representatives by virtue of their office, devolve upon the survivors or survivor².

On the death of a sole executor, or of the last survivor of several executors, the office devolves upon the executor of the sole or last surviving executor³ who has proved the will⁴; and so long as the chain of representation is unbroken, the last executor in the chain is the executor of every preceding testator⁵. The representation is not transmitted, however, unless the original executor⁶ has proved the will of his testator⁷, in England and Wales⁸, or in Northern Ireland in the case of a person who died domiciled there⁹, or the grant of probate by virtue of resealing¹⁰ in England and Wales has the same effect as if made there¹¹.

On the death of an executor who has survived the testator but never proved the will, the rights of that executor wholly cease and the representation to the testator and the administration of his estate devolve and are to be committed in like manner as if the executor had never been appointed executor¹².

1 See PARA 52 post.

2 *Flanders v Clarke* (1747) 3 Atk 509; *Eyre v Countess of Shaftsbury* (1725) 2 P Wms 103 at 121. As to banking practice on the death of a trustee see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 847.

3 Administration of Estates Act 1925 s 7(1). Section 7 does not apply on the death of an executor named in a Scottish confirmation recognised in England: see the Administration of Estates Act 1971 s 1(3); and PARA 239 post.

4 In the text and note 3 supra, 'executor' must be taken to mean an executor who has proved: see the text and notes 6-11 infra.

5 Administration of Estates Act 1925 s 7(2).

6 It was formerly sufficient if the attorney of the original executor obtained a grant with the will (*Re Bayard* (1849) 1 Rob Eccl 768; *Re Murguia* (1884) 9 PD 236), but the wording of the Administration of Estates Act 1925 s 7 does not allow of such an interpretation.

7 Ibid s 7(1).

8 *Re Gaynor* (1869) LR 1 P & D 723; *Twynford v Trail* (1834) 7 Sim 92.

9 See the Administration of Estates Act 1971 s 1(4); and PARA 240 post.

10 See under the Colonial Probates Act 1892 s 2 (as amended): see PARA 245 post.

11 See PARA 243 post.

12 Administration of Estates Act 1925 s 5(i). As to the admission in evidence of the unproved will see PARA 29 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(5) THE CHAIN OF REPRESENTATION/(i) Devolution on Death/48. Reservation of power to prove.

48. Reservation of power to prove.

Where a number of executors are appointed by the will but they do not all prove, power to prove may be reserved to those who do not then prove¹. In that case, if the last proving

executor dies the office devolves upon the executor of the proving executor, but is divested if and when the non-proving executor later proves the will of the original testator². The non-proving executor may, of course, be cited to take probate, and if he does not appear his rights will cease³. If the Public Trustee takes a grant as executor he is considered to continue the chain of executorship⁴.

1 As to double grants see PARA 152 post.

2 Administration of Estates Act 1925 s 7(1).

3 *Re Reid* [1896] P 129, following *Re Noddings* (1860) 2 Sw & Tr 15, as corrected in the Errata and Corrigenda. See also the Administration of Estates Act 1925 ss 5(ii) (see PARA 85 post), 7(1). As to citations see PARAS 94-95 post.

4 See President's Instructions, 27 March 1908; and Tristram and Coote's Probate Practice (28th Edn) 332-335.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(5) THE CHAIN OF REPRESENTATION/(i) Devolution on Death/49. Full executor of limited executor, and vice versa.

49. Full executor of limited executor, and vice versa.

A full executor of a limited executor sufficiently represents the estate of the original testator¹, but not a limited executor of a full executor². Accordingly where, under the old practice of the Probate Court, a limited grant was made to the estate of a married woman, the chain of representation was broken³. The modern practice is, however, to make a general grant⁴.

1 *Re Beer* (1851) 2 Rob Eccl 349. As to special or limited executors see PARA 11 ante.

2 *Re Bayne* (1858) 1 Sw & Tr 132; *Re Bridger* (1878) 4 PD 77.

3 *Re Hughes* (1860) 4 Sw & Tr 209; *Re Martin* (1862) 3 Sw & Tr 1; *Re Richards* (1866) LR 1 P & D 156; *Re Bridger* (1878) 4 PD 77.

4 See PARA 154 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(5) THE CHAIN OF REPRESENTATION/(i) Devolution on Death/50. Break in chain of representation.

50. Break in chain of representation.

The chain of representation is broken by: (1) an intestacy; (2) the failure of a testator to appoint an executor; or (3) the failure of the executor to obtain probate of a will; but it is not broken by a temporary grant of administration provided probate is subsequently granted¹. Accordingly the office does not devolve upon the administrator of an executor. On the death of an administrator the office does not devolve and a fresh grant of administration to the unadministered property of the original testator must be obtained².

1 Administration of Estates Act 1925 s 7(3). As to temporary grants of administration see PARA 203 et seq post. A grant of administration for the use and benefit of an executor during incapacity is equivalent to a grant of probate to him. If a grant for the use and benefit of an executor subject to incapacity is made after the death of his co-executor the executor of the co-executor does not represent the original testator on the death of the executor subject to incapacity: see *Re Frengley* [1915] 2 IR 1.

2 As to administration de bonis non see PARA 201 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(5) THE CHAIN OF REPRESENTATION/(i) Devolution on Death/51. Powers and liabilities.

51. Powers and liabilities.

Every person in the chain of representation to a testator (1) has the same rights in respect of the testator's estate as the original executor would have had if living¹; and (2) to the extent to which the testator's estate has come into his hands, is answerable as if he were an original executor².

Where a debtor becomes his deceased creditor's executor by representation³ his debt⁴ is thereupon extinguished⁵, but he is accountable for the amount of the debt as part of the creditor's estate in any case where he would be so accountable if he had been appointed as an executor by the creditor's will⁶. This does not apply where the debtor's authority to act as executor is limited to part of the estate which does not include the debt; and a debtor whose debt is extinguished by becoming his creditor's executor by representation is not accountable for its amount where the debt was barred by limitation before he became the executor by representation⁷.

1 Administration of Estates Act 1925 s 7(4)(a).

2 Ibid s 7(4)(b).

3 Ibid s 21A(1) (s 21A added by the Limitation Amendment Act 1980 s 10). This provision also applies to administrators: see PARA 33 ante.

4 For the meaning of 'debt' see PARA 33 note 5 ante.

5 Administration of Estates Act 1925 s 21A(1)(a) (as added: see note 3 supra).

6 Ibid s 21A(1)(b) (as added: see note 3 supra). As to the accountability of a debtor executor see PARA 21 ante.

7 Ibid s 21A(2) (as added: see note 3 supra).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(5) THE CHAIN OF REPRESENTATION/(ii) Devolution otherwise than on Death/52. Office not assignable.

(ii) Devolution otherwise than on Death

52. Office not assignable.

Neither the office of executor nor that of administrator is assignable at common law¹, but an executor or administrator has the statutory power of a trustee to delegate by power of attorney the exercise of any trusts, powers or discretions vested in him as such trustee for a period not exceeding 12 months². Any executor who has obtained probate or any administrator who has obtained letters of administration, notwithstanding that he has acted in the administration of the deceased's estate, may, with the consent of the court, after such notice to the persons beneficially interested as the court may direct, transfer the estate to the Public Trustee for administration either solely or jointly with the continuing executors or administrators, if any³.

On the application of a personal representative or of a beneficiary, the court has power to appoint a person called a judicial trustee to act in the administration of a deceased person's property, and, if sufficient cause is shown, to displace the personal representative⁴. The court also has power to appoint a person to act as personal representative in place of the existing personal representative or representatives or any of them⁵.

1 Shep Touch (7th Edn) 465; 2 Bl Com (14th Edn) 506; *Re Skinner*[1958] 3 All ER 273 at 276, [1958] 1 WLR 1043 at 1046 per Sachs J.

2 See the Trustee Act 1925 s 25 (as substituted); and TRUSTS vol 48 (2007 Reissue) PARA 984. The Trustee Act 1925 s 25 (as substituted) applies to a personal representative as it applies to a trustee, except that s 25(4) (as substituted), which relates to notice of the giving of a power of attorney, applies as if it required the notice there mentioned to be given, in the case of a personal representative, to each of the other personal representatives, if any, except any executor who has renounced probate: s 25(10)(a) (as substituted) (see TRUSTS vol 48 (2007 Reissue) PARA 984). Since an executor who has renounced is not normally regarded as an executor, the express exclusion of an executor who has renounced seems to imply that notice should be given to an executor named in the will to whom power to prove the will has been reserved.

In the Trustee Act 1925, 'personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person: s 68(1) PARA (9). Cf para 5 note 1 ante.

3 Public Trustee Act 1906 s 6(2). The court order sanctioning the transfer gives, subject to the provisions of the Public Trustee Act 1906, all the powers of such an executor or administrator to the Public Trustee, and the executor or administrator is not in any way liable in respect of any act or default in reference to the estate subsequent to the date of the order other than the act or default of himself or of persons other than himself for whose conduct he is in law responsible: s 6(2). As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq

4 See the Judicial Trustees Act 1896 s 1(1), (2); and TRUSTS vol 48 (2007 Reissue) PARA 760.

5 See under the Administration of Justice Act 1985 s 50: see PARA 706 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(i) Intermeddling with the Estate/53. Person fraudulently obtaining or retaining estate.

(6) THE EXECUTOR DE SON TORT

(i) Intermeddling with the Estate

53. Person fraudulently obtaining or retaining estate.

Any person who, to the defrauding of creditors or without full valuable consideration, obtains, receives, or holds any real or personal estate¹ of a deceased person or effects the release of any debt or liability due to the estate of the deceased, is chargeable as executor de son tort² to

the extent of the real and personal estate received or coming to his hands, or the debt or liability released, after deducting (1) any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death; and (2) any payment made by him which might properly be made by a personal representative³. Such a person also becomes liable for payment of inheritance tax⁴.

1 For the meaning of 'real estate' see PARA 3 note 1 ante.

2 As to the meaning of 'executor de son tort' see PARA 2 ante. The term is applicable to an intestacy: see PARA 2 text to note 7 ante. As to the procedure to force an executor de son tort to obtain a grant see PARA 95 post; and as to administration proceedings see PARA 709 post.

3 Administration of Estates Act 1925 s 28. For the meaning of 'personal representative' see PARA 4 ante. See also *Hawes v Leader* (1611) Yelv 196; *Nunn v Wilsmore* (1800) 8 Term Rep 521; *Seally v Powis* (1835) 1 Har & W 2.

4 See PARA 58 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(i) Intermeddling with the Estate/54. Slight acts of interference sufficient.

54. Slight acts of interference sufficient.

The slightest circumstance may make a person executor de son tort if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor¹ or administrator². Demanding payment of debts due to the deceased, paying the deceased's debts³, carrying on his business⁴ or disposing of goods⁵ may make a person executor de son tort; but setting up a colourable title to the deceased's goods is not enough⁶. A person who enters on or collects the rents of a deceased person's leasehold property and pays the ground rent may, by reason of privity of estate or estoppel, render himself liable to the landlord on the covenants of the lease as executor de son tort⁷, but a person who takes over leasehold property from an executor de son tort does not⁸.

1 *Peters v Leeder* (1878) 47 LJQB 573.

2 As to the relation back of an administrator's title after grant see PARA 35 ante.

3 Godolphin's Orphan's Legacy, Pt II, c 8 s 1. In *Serle v Waterworth* (1838) 4 M & W 9 (revsd on another point sub nom *Nelson v Serle* (1839) 4 M & W 795) the giving by the deceased's widow of a promissory note for a debt which was owing from the deceased was held not to constitute the widow executrix de son tort.

4 *Hooper v Summersett* (1810) Wight 16.

5 *Read's Case* (1604) 5 Co Rep 33b; *Nulty v Fagan* (1888) 22 LR Ir 604.

6 *Femings v Jarrat* (1795) 1 Esp 335; Godolphin's Orphan's Legacy, Pt II, c 8 s 3.

7 *Williams v Heales* (1874) LR 9 CP 177; *Stratford-upon-Avon Corp'n v Parker* [1914] 2 KB 562, DC.

8 *Paull v Simpson* (1846) 9 QB 365.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(i) Intermeddling with the Estate/55. Acts of charity or necessity.

55. Acts of charity or necessity.

If necessity arises a person may give directions for the funeral of the deceased person¹, and may appropriate a reasonable sum for that purpose out of the deceased's money². He may also place the deceased's goods in a place of safety³, lock them up for preservation and make an inventory of them⁴, may order necessities for the household, provide for the deceased's horses and cattle, and pay any doctor's fees⁵. By so doing he will not make himself liable as an executor de son tort⁶.

1 *Harrison v Rowley* (1798) 4 Ves 212 at 216.

2 *Goldolphin's Orphan's Legacy*, Pt II c 8 s 6; *Camden v Fletcher* (1838) 4 M & W 378 at 381 per Parke B.

3 *Re Fitzpatrick* (1892) 29 LR Ir 328.

4 *Goldolphin's Orphan's Legacy*, Pt II c 8 s 3.

5 *Goldolphin's Orphan's Legacy*, Pt II c 8 ss 3, 6; *Long and Feaver v Symes and Hannam* (1832) 3 Hag Ecc 771.

6 As to the analogous question whether or not an executor has by his conduct accepted his appointment as executor see PARA 23 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(i) Intermeddling with the Estate/56. Receipt of property.

56. Receipt of property.

A person who receives payment from the executor de son tort of a debt due from the deceased¹ or who takes over property of a deceased person from an executor de son tort does not himself become an executor de son tort² although, if he has taken the property with notice of a trust, it may be followed into his hands as trust property³.

A person who takes possession of the foreign assets of a deceased person without taking possession of his English assets does not become executor de son tort⁴. A person who, as a nominee holder for the deceased's estate of assets in the United Kingdom, procures the transfer of the assets out of the United Kingdom is an executor de son tort⁵.

A person who takes possession of the effects under the authority or as agent of a rightful executor, whether or not the will has been proved, cannot be charged as executor de son tort⁶, and, although his authority may be revoked by the death of the rightful executor, so as to render him chargeable if, after his principal's death, he proceeds to act as an executor⁷, yet the mere retention of the assets as a trustee for the person beneficially entitled will not render him chargeable as executor de son tort⁸.

1 *Hursell v Bird* (1891) 65 LT 709.

2 *Paull v Simpson* (1846) 9 QB 365; *Hill v Curtis* (1865) LR 1 Eq 90 at 97 per Page Wood V-C.

- 3 *Hill v Curtis* (1865) LR 1 Eq 90. See also EQUITY vol 16(2) (Reissue) PARA 861.
- 4 *Beavan v Lord Hastings* (1856) 2 K & J 724.
- 5 *IRC v Stype Investments (Jersey) Ltd, Re Clore* [1982] Ch 456, [1982] 3 All ER 419, CA.
- 6 *Hall v Elliot* (1791) Peake 86; *Sykes v Sykes* (1870) LR 5 CP 113.
- 7 *Cottle v Aldrich* (1815) 4 M & S 175.
- 8 *Tomlin v Beck* (1823) Turn & R 438.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(i) Intermeddling with the Estate/57. Determination of liability.

57. Determination of liability.

The question whether a person has intermeddled is one of fact: the result of that intermeddling, namely whether it constitutes the person an executor de son tort, is a matter of law¹.

1 *Padget v Priest* (1787) 2 Term Rep 97. Therefore the question whether a person has tortiously intermeddled with an estate could not normally be determined on an originating summons: *Re Chalmers, Chalmers v Chalmers* (1921) 65 Sol Jo 475. As to the current procedure see now CPR Pt 8; and CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(ii) Effect of Acts of Executor de son Tort/58. Lawful acts bind the estate.

(ii) Effect of Acts of Executor de son Tort

58. Lawful acts bind the estate.

Generally speaking, all lawful acts done in the professed administration of the estate by a person purporting to act as personal representative which a rightful executor would have been bound to perform in due course of administration, bind the estate¹. To render an act binding, it must be shown that at the time when it was done the person who did it was acting in the character of executor; an isolated wrongful act consisting of the handing over of goods of the deceased to a creditor is not of itself binding on the estate².

The rule that lawful acts bind the estate will apply where an executor de son tort acts in obedience to a statutory duty which extends to such an executor. For example, an executor de son tort is within the meaning of 'personal representative'³ for the purposes of liability⁴ to inheritance tax⁵, but not for the purposes of the Trustee Act 1925⁶.

1 *Coulter's Case* (1598) 5 Co Rep 30a; *Parker v Kett* (1701) 1 Ld Raym 658 at 661; *Buckley v Barber* (1851) 6 Exch 164 at 183; *Thomson v Harding* (1853) 2 E & B 630.

2 *Mountford v Gibson* (1804) 4 East 441.

3 See the Inheritance Tax Act 1984 s 272, by which 'personal representative' includes any such person as is mentioned in s 199(4)(a) (ie any person who takes possession of or intermeddles with, or otherwise acts in relation to, property so as to become liable as executor or trustee): see INHERITANCE TAXATION vol 24 (Reissue) PARAS 432, 634. See *New York Breweries Co Ltd v A-G* [1899] AC 62, HL; *IRC v Stype Investments (Jersey) Ltd, Re Clore* [1982] Ch 456, [1982] 3 All ER 419, CA.

4 As to the liability of personal representatives for inheritance tax see in particular the Inheritance Tax Act 1984 ss 200(1)(a), 204(1); and as to repayment of tax to personal representatives by the person in whom property is vested see s 211(3). See further INHERITANCE TAXATION vol 24 (Reissue) PARAS 636, 644.

5 As to the burden of inheritance tax on death see PARA 546 post. See also generally INHERITANCE TAXATION vol 24 (Reissue) PARA 403.

A person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court is, as regards any liability for payment of death duties, capital transfer tax, or inheritance tax, a 'personal representative' within the definition contained in the Administration of Estates Act 1925 s 55(1)(xi), the Law of Property Act 1925 s 205(1)(xviii), and the Land Registration Act 1925 s 3(xvii): see notes 3, 4 supra; and PARA 4 ante. As to the abolition of capital transfer tax and its replacement by inheritance tax see PARA 546 note 2 post; and INHERITANCE TAXATION vol 24 (Reissue) PARA 401 et seq.

Accordingly it seems that an executor de son tort has the statutory powers of a personal representative under the foregoing Acts so far as applicable for the purpose of paying inheritance tax, or, in the case of a death before 25 July 1986, capital transfer tax or estate duty. An executor de son tort also has power under Inheritance Tax Act 1984 s 212 to sell or mortgage any property in respect of which he is liable for inheritance tax in order to pay the tax, interest on it, and costs properly incurred in respect of it: see INHERITANCE TAXATION vol 24 (Reissue) PARA 652.

6 See the Trustee Act 1925 s 68(1) PARA (9); and TRUSTS vol 48 (2007 Reissue) PARA 602. Consequently an executor de son tort is not 'a personal representative' for the purposes of the definition of 'trustee' in that Act, which includes a personal representative: see PARA 5 ante; and TRUSTS vol 48 (2007 Reissue) PARA 602.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(iii) Liabilities and Rights of an Executor de son Tort/59. Liability to be sued.

(iii) Liabilities and Rights of an Executor de son Tort

59. Liability to be sued.

An executor de son tort is liable to be sued by the rightful representative¹, a creditor² or a beneficiary³. He is not liable for more than has come to his hands⁴, and he may, as against the rightful representative, set up in mitigation of damages all payments made by him in due course of administration⁵; but it would appear that he cannot avail himself of any right of recoupment if the rightful representative is a creditor and there are insufficient assets left to pay his debt⁶.

At one time an executor de son tort could rely on the law of limitation in the same manner and subject to the same considerations as could a properly appointed executor⁷, but the position is now more complex⁸. A properly appointed executor cannot obtain title by long possession against those interested in the estate because he is a trustee for the purposes of the Limitation Act 1980⁹, and by that Act no period of limitation applies to a claim by a beneficiary to recover trust property in the possession of a trustee¹⁰. An executor de son tort, however, is not as such a trustee for the purposes of that Act¹¹; and consequently he may be able to establish a title by possession provided he is not shown in the particular circumstances of the case to be an express or constructive trustee¹².

After judgment has been obtained by a creditor of the deceased against the executor de son tort, execution may issue against chattels real of which the executor de son tort has taken possession¹³.

An executor de son tort may be liable for inheritance tax¹⁴, and may also be liable to a penalty for administering without obtaining a grant of probate or letters of administration¹⁵.

A minor who intermeddles with an estate cannot be made to account as an executor de son tort¹⁶.

1 Godolphin's Orphan's Legacy, Pt II c 8 s 2.

2 *Kellow v Westcombe* (1673) Freem KB 122; 2 Bl Com (14th Edn) 506. As to administration proceedings see PARA 709 post.

3 1 Roll Abr 919 (F 1).

4 *Stokes v Porter* (1558) 2 Dyer 166b; *Lowry v Fulton* (1839) 9 Sim 115; *Yardley v Arnold* (1842) Car & M 434.

5 *Padget v Priest* (1787) 2 Term Rep 97; *Fyson v Chambers* (1842) 9 M & W 460 at 468 per Lord Abinger CB. The decision in *Woolley v Clark* (1822) 5 B & Ald 744, disallowing recoupment, probably went on the ground that the executor de son tort had not acted in good faith: see *Thomson v Harding* (1853) 2 E & B 630 at 635 per Lord Campbell CJ.

6 2 Bl Com (14th Edn) 507; *Mountford v Gibson* (1804) 4 East 441 at 453; *Elworthy v Sandford* (1864) 3 H & C 330. Under the old form of pleading the executor de son tort could not, as against the rightful representative, plead his payments in abatement of the action: *Whitehall v Squire* (1691) Carth 103.

7 *Webster v Webster* (1804) 10 Ves 93; *Doyle v Foley* [1903] 2 IR 95.

8 Ie since the Limitation Act 1939, subsequently re-enacted with amendments as the Limitation Act 1980.

9 In the Limitation Act 1980, 'trustee' has the same meaning as in the Trustee Act 1925 (see the Limitation Act 1980 s 38(1)), and consequently includes a properly appointed executor but not an executor de son tort: see the Trustee Act 1925 s 68(1) PARAS (9), (17); *James v Williams* [1999] 3 All ER 309, CA; and PARA 5 text and notes 1-2 ante. See also LIMITATION PERIODS vol 68 (2008) PARA 1094; TRUSTS vol 48 (2007 Reissue) PARA 698.

10 See the Limitation Act 1980 s 21(1); and LIMITATION PERIODS vol 68 (2008) PARA 1140.

11 See note 9 supra.

12 For an example of an executor de son tort who was held to be a constructive trustee for this purpose see *James v Williams* [1999] 3 All ER 309, CA (beneficiary under an intestacy who occupied the deceased's land while there was no grant of letters of administration held to be a constructive trustee). Cf *Earnshaw v Hartley* [1999] 3 WLR 709, CA (limitation defence of beneficiary in occupation of land in an intestate's estate held to be defeated by virtue of Limitation Act 1980 s 15(6), Sch 1 para 9). See also the article by F Hinkes in 38 Conveyancer (NS) (May-June 1974) 177.

13 *Doherty v Nelson* [1895] 2 IR 90.

14 See PARA 58 ante. As to the liability to penalties for failure to deliver accounts etc in relation to inheritance tax see INHERITANCE TAXATION vol 24 (Reissue) PARA 708 et seq.

15 See PARA 64 post.

16 *Stott v Meanock* (1862) 31 LJ Ch 746. As to the appointment of minors see PARA 16 ante.

60. Answer to creditor's action.

As against a creditor an executor de son tort may plead that he has fully administered the estate¹, or that he has, before a claim has been brought, handed over all the assets in his hands to the rightful representative², or has settled accounts with him³; but it is no answer to the creditor that he has done so after a claim has been brought⁴, nor can he obtain a valid discharge by handing over the assets to another who has himself never become a rightful representative of the deceased⁵.

1 *Oxenham v Clapp* (1831) 2 B & Ad 309 (where the executor de son tort paid a specialty debt after action brought by a simple contract debtor and successfully pleaded the payment in bar of action); *Yardley v Arnold* (1842) Car & M 434. As to the plea of full administration (plene administravit) see PARA 828 post.

2 *Padget v Priest* (1787) 2 Term Rep 97.

3 *Hill v Curtis* (1865) LR 1 Eq 90, dissenting from dicta of Lord Cottenham LC in *Carmichael v Carmichael* (1846) 2 Ph 101 at 103.

4 *Curtis v Vernon* (1790) 3 Term Rep 587 (affd sub nom *Vernon v Curtis* (1792) 2 Hy Bl 18); *Layfield v Layfield* (1834) 7 Sim 172; cf *Oxenham v Clapp* (1831) 2 B & Ad 309 (see note 1 supra).

5 *Sharland v Mildon, Sharland v Loosemore* (1846) 5 Hare 469; *Hill v Curtis* (1865) LR 1 Eq 90 at 100.

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61. Other civil liabilities.

An executor de son tort is answerable for the acts of another when authorised and directed by him¹. The executor de son tort of a rightful executor is also liable for the original testator's debts². An executor de son tort may be required to submit a statement of the deceased's affairs after an insolvency administration order has been made in respect of the deceased's estate³.

1 *Re Ryan, Kenny v Ryan* [1897] 1 IR 513.

2 *Meyrick v Anderson* (1850) 14 QB 719.

3 See the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, arts 3, 5, Sch 1 Pt II para 15, Sch 2 para 1 (under which, if there is no personal representative, a statement of affairs can be required from such person as the court may on the application of the official receiver direct); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 244.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(6) THE EXECUTOR DE SON TORT/(iii) Liabilities and Rights of an Executor de son Tort/62. Liability of representative of executor de son tort.

62. Liability of representative of executor de son tort.

The executor or administrator of a defaulting executor de son tort, namely one who has wasted or converted to his own use any real or personal estate¹ of a deceased person, is, to the extent of the defaulter's available assets, liable and chargeable in respect of that waste or conversion in the same manner as the defaulter would have been if living². However, in the absence of any allegation of waste or conversion by the executor de son tort, his representative is not liable for a breach of contract committed by the person with whose goods the executor de son tort has intermeddled³.

1 For the meaning of 'real estate' see PARA 3 note 1 ante.

2 Administration of Estates Act 1925 s 29. This provision applies generally to the personal representative of a defaulting personal representative and not merely to the personal representative of a defaulting executor de son tort; cf para 797 post.

3 *Wilson v Hodson* (1872) LR 7 Exch 84; cf *Coward v Gregory* (1866) LR 2 CP 153 (see PARA 797 note 4 post).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/63. Need for grant.

(7) THE NEED FOR AND EFFECT OF A GRANT

63. Need for grant.

In certain cases small amounts of money may be disposed of by nomination or by payment to persons appearing to be entitled to them and no grant of probate or administration is required¹. In general, however, a grant of probate or letters of administration in the United Kingdom² is necessary to enable the personal representatives to make title³ to the deceased's property and thereafter to administer, collect and protect it for the benefit of the persons interested in the estate, whether as creditors, legatees or next of kin. In particular a grant is essential if the estate comprises real property or securities. A foreign personal representative cannot sue in the United Kingdom in his capacity as such⁴. While an executor who does not obtain a grant in the United Kingdom may validly appoint a trustee of the assets of the estate under the Trustee Act 1925⁵, that trustee can only prove his title by reference to a proper grant of representation⁶.

No grant is necessary in so far as the deceased has disposed of property by *donatio mortis causa*⁷, because such a gift requires no act by the representative to vest it in the donee⁸.

The civil remedy for failure to take out a grant is by citation⁹. If an executor has acted, he can be compelled to take probate¹⁰.

1 See PARA 187 post. As to funds in court see PARA 192 post.

2 As to the recognition of Scottish confirmations and Northern Irish grants see PARAS 239-240 post. As to the resealing of grants under the Colonial Probates Act 1892 see PARA 245 post. As to the acceptance of probate issued in the Isle of Man or Channel Islands as authority for the transfer of stock registered in the National Savings Stock Register, or the repayment or transfer of savings certificates to the person to whom the grant was made see the National Debt Act 1972 s 7 (as amended); the Savings Certificates Regulations 1991, SI 1991/1031, reg 14; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1358. For the meaning of 'United Kingdom' see PARA 18 note 4 ante.

3 See the Revenue Act 1884 s 11 (as amended); the Administration of Estates Act 1925 s 2(1); and PARA 31 notes 3-4 ante. As to an exception in the case of certain life assurance policies see PARA 191 post. The grant of

probate provides conclusive evidence of the executor's appointment and the terms and authenticity of the will: *Griffiths v Hamilton* (1806) 12 Ves 298. See also PARAS 65, 264-265 post. During the subsistence of a grant of administration even a validly appointed executor is prevented by statute from acting: see PARA 65 text and note 10 post. As to the necessity for a grant to maintain proceedings see PARAS 31, 37 ante.

4 See CONFLICTOFLAWS vol 8(3) (Reissue) PARA 439. As to foreign domicile grants see PARA 252 et seq post.

5 See the Trustee Act 1925 s 36 (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 835 et seq.

6 *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991 at 1001-1002, [1974] 1 WLR 583 at 594-595 per Goulding J.

7 Is a gift conditional on death: see GIFTS vol 52 (2009) PARA 271 et seq.

8 See PARA 340 post; and GIFTS vol 52 (2009) PARA 271 et seq.

9 See *Re Stevens, Cooke v Stevens* [1897] 1 Ch 422 at 434; on appeal [1898] 1 Ch 162 at 177, CA, per Vaughan Williams LJ. As to citation see PARAS 24 ante, 96 post. As to the court's power to order production of a will see PARA 76 post. As to liability to a penalty see PARA 64 post.

10 See PARA 24 ante. A person who has intermeddled as executor de son tort but has not been appointed executor cannot be compelled to take a grant of administration: *Re Davis* (1860) 4 Sw & Tr 213. As to administration proceedings in such a case see PARA 709 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/64. Penalty for administering without probate or letters of administration.

64. Penalty for administering without probate or letters of administration.

Any person who takes possession of and in any way administers any part of the estate and effects of any deceased person without obtaining probate of the will or letters of administration of the estate and effects of the deceased within certain time limits¹ is liable to forfeit the sum of £100².

1 Is within six calendar months after the death of the deceased or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration if there is any such dispute which is not ended within four calendar months after the death: see the Stamp Act 1815 s 37 (as amended: see note 2 infra).

2 Ibid s 37 (amended by the Statute Law Revision Act 1890; and by the Finance Act 1975 ss 52(2), (3), 59(5), Sch 13 Pt I). The Stamp Act 1815 s 37 (as amended) merely inflicts a penalty for failure to prove the will or take out letters of administration within the specified time; it was not intended that the representative should be prevented from taking out probate or letters of administration after that time: *Bodger v Arch* (1854) 10 Exch 333 at 337 per Parker B. See also *New York Breweries Co v A-G* [1899] AC 62, HL (liability of company which made payments in favour of foreign executors of deceased member, although they had refused to obtain English probate).

Although the penalty is not in terms confined to cases where what is now inheritance tax (see PARA 58 note 5 ante) is payable, it seems that the penalty will not in fact be exacted where no such tax or duty is payable; cf *Bodger v Arch* supra at 337, where it was said that the sole object of the Stamp Act 1815 was to secure the payment of duty to the revenue.

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65. Effect of grant.

Probate and letters of administration¹ with a will annexed, while unrevoked, are conclusive evidence of the due execution and validity of the will². Similarly, letters of administration are conclusive of the deceased's intestacy³. Probate is also conclusive as to the working of the will, and no division of the High Court other than that to which probate business is assigned⁴ will rectify any error in the probate⁵. No other division will take notice of the right to a grant of representation to the estate of a deceased person⁶, and when the probate court has established the right, no other court will permit it to be gainsaid⁷. Where administration⁸ has been granted in respect of any real or personal estate⁹ of a deceased person, no person can bring any claim or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked¹⁰. A grant of probate or letters of administration is not as against a purchaser invalidated on the ground of want of jurisdiction, whether the purchaser has notice of the want or not¹¹. A probate claim has been described as in a sense an action in rem¹².

1 As to the indorsement on probates and letters of administration of memoranda of orders made under the enactments relating to family provision see PARA 702 post.

2 *Whicker v Hume* (1858) 7 HL Cas 124 at 143, 156, 165; *Re Barrance, Barrance v Ellis* [1910] 2 Ch 419; *Re Wernher, Wernher v Beit* [1918] 1 Ch 339 at 350-351 (affd on other grounds [1918] 2 Ch 82, CA). As to the derivation of an executor's title from the will see PARA 29 ante. As to the effect of revocation see PARAS 264-265 post.

3 *Tourton v Flower* (1735) 3 P Wms 369. As to the relation back of an administrator's title see PARA 35 ante.

4 See PARA 74 post.

5 *Re Bywater, Bywater v Clarke* (1881) 18 ChD 17 at 22, CA, per James CJ. As to the assignment of probate business see PARA 74 post.

6 Although other divisions of the High Court have jurisdiction to entertain probate proceedings, they would in fact refrain from exercising it: see PARA 74 post. As to an executor's powers before probate to begin a claim see PARA 31 ante.

7 See *A-G v Partington* (1864) 3 H & C 193 at 204, Ex Ch (affd sub nom *Partington v A-G* (1869) LR 4 HL 100); and see *Logan v Fairlie* (1825) 2 Sim & St 284 (revsd on another point (1835) 1 My & Cr 59); *Tyler v Bell* (1837) 2 My & Cr 89; *Price v Dewhurst* (1838) 4 My & Cr 76 at 81; *Bond v Graham* (1842) 1 Hare 482; *Whyte v Rose* (1842) 3 QB 493 at 507, Ex Ch; *Lasseur v Tyrconnel* (1846) 10 Beav 28 (decisions before the merger of the former courts of common law, chancery and probate by the Supreme Court of Judicature Act 1873). The case of *M'Mahon v Rawlings* (1848) 16 Sim 429, as reported, appears incapable of explanation. The grant constitutes an order of the court: see PARA 75 post.

8 For the meaning of 'administration' see PARA 3 note 1 ante.

9 For the meaning of 'real estate' see PARA 3 note 1 ante.

10 Administration of Estates Act 1925 s 15. See also *Re West, Barclays Bank Ltd v Handley* [1947] WN 2.

11 See the Law of Property Act 1925 s 204. See also *Re Bridgett and Hayes' Contract* [1928] Ch 163 at 168 (see also PARA 234 note 2 post); *Hewson v Shelley* [1914] 2 Ch 13, CA.

12 See *Re Langton* [1964] P 163 at 175, [1964] 1 All ER 749 at 757, CA, per Danckwerts LJ. As to the extent to which a judgment in a probate claim is effective against persons who are not parties see PARA 287 post; and see also PARA 257 note 1 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/66. Grant not conclusive as to collateral matters.

66. Grant not conclusive as to collateral matters.

The judgment of the probate court¹ is conclusive only of the right directly determined and not of any collateral matter². If the testator is in fact dead³ the grant is the sole⁴ and conclusive⁵ proof of the personal representative's title, but not of the identity of the person who has obtained it⁶, or of the deceased's domicile⁷, nor is it strictly even prima facie evidence of death⁸. Where administration has been granted to a person as the next of kin of an intestate, the Chancery Division refuses, except under its probate jurisdiction, to try the question whether in fact the administrator is of kin to him or not⁹, and where the decision of the probate court in an administration claim has turned on the question which of the parties is next of kin, that decision is conclusive upon that question in a subsequent claim between the same parties for distribution¹⁰, but would not be so against a person who was neither a party to nor bound by the probate proceedings¹¹. A court will, however, decide upon the claims of next of kin additional to those known at the time of the grant if this can be done without in effect revoking or neutralising the grant¹².

The fact that the probate court has admitted a document to probate as forming part of a testator's testamentary provisions does not prevent another court from coming to the conclusion, as a matter of construction, that the document has no operative effect¹³.

1 See PARA 74 post.

2 *Blackham's Case* (1709) 1 Salk 290.

3 *Allen v Dundas* (1789) 3 Term Rep 125.

4 *Pinney v Pinney* (1828) 8 B & C 335; *Pinney v Hunt* (1877) 6 ChD 98; cf *Cox v Allingham* (1822) Jac 514; *Re Ivory, Hankin v Turner* (1878) 10 ChD 372.

5 *Allen v Dundas* (1789) 3 Term Rep 125; cf *Marriot v Marriot* (1725) 1 Stra 666.

6 *Ex p Joliffe* (1845) 8 Beav 168 at 174.

7 *Whicker v Hume* (1858) 7 HL Cas 124 at 144; *Bradford v Young* (1884) 26 ChD 656; *Concha v Concha* (1886) 11 App Cas 541, HL; but see *Vardy v Smith* (1832) 48 TLR 661 (affd 49 TLR 36, CA) where Lord Merrivale P decided the question whether one or the other of two claimants was the deceased's widow by accepting the judgment of a foreign court dissolving the marriage of one of the claimants with the deceased. See also PARA 75 post. Letters of administration are prima facie evidence of the deceased's domicile: *Eames v Hacon* (1881) 18 ChD 347 at 352, CA. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

8 *Moons v De Bernales* (1826) 1 Russ 301 at 307; *Allen v Dundas* (1789) 3 Term Rep 125. Under exceptional circumstances the grant has been admitted as evidence of death: see *French v French* (1755) 1 Dick 268; *Loyd v Finlayson* (1797) 2 Esp 564.

9 *Re Ivory, Hankin v Turner* (1878) 10 ChD 372; *Re Ward, National Westminster Bank Ltd v Ward* [1971] 2 All ER 1249, [1971] 1 WLR 1376.

10 *Barrs v Jackson* (1845) 1 Ph 582.

11 *Mohan v Broughton* [1900] P 56 at 58, CA, per Lindley MR. See also *Long v Wakeling* (1839) 1 Beav 400; and PARA 75 post.

12 See *Re Ward, National Westminster Bank Ltd v Ward* [1971] 2 All ER 1249 at 1252-1253, [1971] 1 WLR 1376 at 1380-1381 per Plowman J, explaining *Re Ivory, Hankin v Turner* (1878) 10 ChD 372, and *Concha v Concha* (1886) 11 App Cas 541, HL.

13 *Re Hawksley's Settlement, Black v Tidy* [1934] Ch 384 at 396 per Luxmoore J; *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514 at 547, sub nom *Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1967] 3 All ER 915 at 925, PC. As to the distinction between the principles applied by a court of probate and those applied by a court of construction see PARA 104 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/67. Forgery and fraud.

67. Forgery and fraud.

Even after a grant of probate the courts have full jurisdiction to decide that the will is a forgery¹, and where probate has been obtained by a fraud practised upon the next of kin, a court of equity has jurisdiction to declare the wrongdoer a trustee in respect of the probate², but it cannot, on the ground of fraud practised upon the testator, set aside a will which has been admitted to probate³, nor ought it to declare a person who has fraudulently obtained a benefit under the will a trustee for the person defrauded⁴.

1 *R v Gibson* (1802) Russ & Ry 343n; *R v Buttery and McNamara* (1818) Russ & Ry 342, CCR (overruling *R v Vincent* (1721) 1 Stra 481); *Priestman v Thomas* (1884) 9 PD 210, CA. See also *Allen v Dundas* (1789) 3 Term Rep 125; *Boxall v Boxall* (1884) 27 ChD 220; cf *Gallagher v Kennedy* [1931] NI 207.

2 *Barnesly v Powel* (1748) 1 Ves Sen 119 at 284; *Meadows v Duchess of Kingston* (1775) Amb 756 at 762.

3 *Gingell v Horne* (1839) 9 Sim 539; *Allen v M'Pherson* (1847) 1 HL Cas 191; *Meluish v Milton* (1876) 3 ChD 27, CA.

4 See *Meluish v Milton* (1876) 3 ChD 27 at 33, CA, per James LJ. As to revocation of a grant on the ground of fraud see PARA 257 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/68. Purpose for which court may look at original will.

68. Purpose for which court may look at original will.

A court of equity has power to look at the original will for the purpose of construing it¹, even though the probate copy is in facsimile², but it is not entitled to look at the original will with a view to correcting an inaccuracy in the probate copy³. Probate granted of a will and codicil is conclusive of the fact of two instruments, even if written on the same paper⁴. Where, however, a codicil is executed in duplicate and probate is granted of both writings, evidence is admissible to show that they were one and not two instruments⁵.

1 *Compton v Bloxham* (1845) 2 Coll 201; *Manning v Purcell* (1855) 7 De GM & G 55; *Re Harrison, Turner v Hellard* (1885) 30 ChD 390, CA. See also *Reeves v Reeves* [1909] 2 IR 521 at 533; *Re Battie-Wrightson, Cecil v Battie-Wrightson* [1920] 2 Ch 330. The court may look at the foreign original, even where only an English translation has been proved: *Re Cliff's Trusts* [1892] 2 Ch 229.

2 *Shea v Boschetti* (1854) 18 Beav 321.

3 *Oppenheim v Henry* (1853) 9 Hare 802n. See also *Havergal v Harrison* (1843) 7 Beav 49; *Gann v Gregory* (1854) 3 De GM & G 777.

4 *Baillie v Butterfield* (1787) 1 Cox Eq Cas 392.

5 *Hubbard v Alexander* (1876) 3 ChD 738; cf *Whyte v Whyte* (1873) LR 17 Eq 50.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/69. Non-proving executors.

69. Non-proving executors.

Probate granted to one of several executors enures for the benefit of all¹. The application of this principle led to the rule that in actions at law² the action was not properly constituted unless all the executors appointed by the will joined as plaintiffs even though some had not proved³. It has even been said that on the death of the one who has proved the surviving executor can sue even though he has never proved⁴. It is no longer necessary or proper for non-proving executors to sue or be sued as representing the testator's estate since the proving executors can exercise all the powers conferred by law on the personal representatives⁵. Whether or not it ever was or still is good law that a surviving executor can sue without obtaining probate, it has for a long time been the invariable practice to require the surviving executor to establish his title by obtaining a grant of probate.

1 *Webster v Spencer* (1820) 3 B & Ald 360; *Watkins v Brent* (1835) 7 Sim 512; on appeal 1 My & Cr 97.

2 The rule apparently did not apply in suits in equity: see *Cummins v Cummins* (1845) 3 Jo & Lat 64 at 92.

3 Selwyn's *Nisi Prius* (6th Edn) 784; Bullen & Leake's *Pleadings* (3rd Edn) 153, 472; *Brookes v Stroud* (1702) 7 Mod Rep 39; *Walters v Pfeil* (1829) Mood & M 362; *Cummins v Cummins* (1845) 3 Jo & Lat 64 at 92.

4 See the Irish case of *Cummins v Cummins* (1845) 3 Jo & Lat 64 at 93-94 obiter per Lord Sugden LC. Although this statement was obiter, the whole question of the rights of non-proving executors was carefully considered by the Lord Chancellor in that case at 92-96.

5 See the Administration of Estates Act 1925 s 8; and PARA 25 ante. As to notice on delegation of powers by the proving executor see PARA 52 note 2 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/70. Effect of grant upon real estate.

70. Effect of grant upon real estate.

All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real apply to a deceased person's real estate¹.

1 As to deaths on or after 1 January 1898 and before 1 January 1926 see the Land Transfer Act 1897 s 2(2) (repealed as to deaths after 1925), and as to deaths on or after 1 January 1926 see the Administration of Estates Act 1925 s 2(1) (see PARA 363 post).

For the meaning of 'real estate' for the purposes of the Land Transfer Act 1897 see s 1(4) (repealed as to deaths after 1925) (see PARA 363 post), and for its meaning for the purposes of the Administration of Estates Act 1925 see s 3(1) (as amended) (see PARA 364 post).

As to the concurrence of all the personal representatives in a contract or conveyance of real estate see PARA 443 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/1. THE OFFICE OF REPRESENTATIVE/(7) THE NEED FOR AND EFFECT OF A GRANT/71. Evidence.

71. Evidence.

Every document¹ purporting to be sealed or stamped with the seal or stamp of the Supreme Court or of any office of the Supreme Court is to be received in evidence in all parts of the United Kingdom without further proof².

1 An official copy of the whole or any part of a will, or an official certificate of any grant of administration, may be obtained on payment of the prescribed fee: see PARA 132 post.

2 Supreme Court Act 1981 s 132. For the meaning of 'United Kingdom' see PARA 18 note 4 ante. As to the reception in one part of the United Kingdom of grants issued in another part see further PARA 238 post. As to the proof of a will in support of title by virtue of the presumption in favour of documents not less than 20 years old produced from proper custody see CIVIL PROCEDURE vol 11 (2009) PARA 869 et seq. The grant of representation constitutes an order of the court: see PARA 75 post.

UPDATE

71 Evidence

TEXT AND NOTES--For 'Supreme Court' in both places substitute 'Senior Courts' and Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 paras 1, 26 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/72. Derivation of jurisdiction.

2. THE GRANT OF PROBATE OR ADMINISTRATION

(1) THE HIGH COURT

(i) Jurisdiction

72. Derivation of jurisdiction.

The existing jurisdiction to grant and revoke probates and letters of administration dates from 11 January 1858¹, on which date both the voluntary and contentious jurisdiction and authority of all then existing courts² and persons in relation to the granting or revocation of probates or

letters of administration were absolutely determined³, and were vested in a court known as the Court of Probate⁴.

The Court of Probate was established as a court of record exercising the same powers throughout the whole of England as the Prerogative Court of the Archbishop of Canterbury then exercised in the province of Canterbury in relation to testamentary matters and causes and to the effects of deceased persons within its jurisdiction⁵. The court was given power to require the attendance of witnesses and the production of documents⁶, and the practice was to be that of the Prerogative Court of Canterbury⁷. A principal probate registry was established in London, and district registries were set up in the provinces⁸. The Court of Probate was prohibited from entertaining suits for legacies or for the distribution of residues⁹.

1 le the date of commencement of the Court of Probate Act 1857: see s 1 (repealed).

2 The chief of the existing courts having probate jurisdiction were the ecclesiastical courts. As to the origin and history of ecclesiastical courts see ECCLESIASTICAL LAW.

3 Court of Probate Act 1857 s 3 (repealed).

4 Ibid s 4 (repealed).

5 Ibid s 23 (repealed).

6 Ibid s 24 (repealed).

7 Ibid s 29 (repealed). The present practice is governed in relation to non-contentious business by non-contentious probate rules and in relation to contentious business by the Civil Procedure Rules 1998: see PARAS 81-82 post. As to the CPR see PARA 37 note 3 ante.

8 Court of Probate Act 1857 ss 4, 13, Sch A (all repealed). A new scheme of district probate registries was embodied in the Supreme Court of Judicature (Consolidation) Act 1925, Sch 2 (repealed): see PARA 79 post; and COURTS.

9 Court of Probate Act 1857 s 23 (repealed).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/73. Transfer of jurisdiction to High Court.

73. Transfer of jurisdiction to High Court.

In 1875 the Court of Probate¹ became consolidated with other courts into the Supreme Court of Judicature², and its jurisdiction became vested in the High Court of Justice³. The High Court has all the powers possessed by the old Court of Probate and those conferred on it by statute since 1875, in respect of both real and personal estate⁴.

1 As to the Court of Probate see PARA 72 ante.

2 See the Supreme Court of Judicature Act 1873 s 3 (repealed); and COURTS.

3 Ibid s 16 (repealed).

4 See the Supreme Court Act 1981 ss 19, 25; and COURTS. Subject to the provisions of Pt V (ss 105-128) (as amended) (see PARA 79 et seq post), the High Court, in relation to probate and letters of administration, has all jurisdiction as it had immediately before the commencement of the Act (ie 1 January 1982) (see COURTS), and in particular all such contentious and non-contentious jurisdiction as it then had in relation to: (1) testamentary causes or matters; (2) the grant, amendment or revocation of probate and letters of administration; and (3) the real and personal estate of deceased persons: s 25(1). Subject to the provisions of Pt V (as amended), the High Court performs, in the exercise of its probate jurisdiction, all such duties with respect to the estates of deceased persons as fell to be performed by it immediately before the commencement of the Act: s 25(2).

Before 1 January 1982, the High Court had jurisdiction over: (a) all voluntary and contentious jurisdiction in relation to the making and revocation of grants which was at the commencement of the Court of Probate Act 1857 (ie 11 January 1858) exercisable by any court or person in England (cf para 72 text and notes 1-4 ante); (b) all such powers throughout England in relation to personal estate in England of deceased persons as the Prerogative Court of Canterbury had immediately before the commencement of that Act within its jurisdiction (cf para 72 text to note 5 ante); (c) the like jurisdiction with regard to real estate as was conferred (see heads (a)-(b) supra) as regards personal estate; and (d) all probate jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Supreme Court of Judicature Act 1873 (ie 1 November 1875: see COURTS) and was not repealed by the Supreme Court of Judicature (Consolidation) Act 1925, was immediately before the commencement of the Supreme Court of Judicature (Consolidation) Act 1925 vested in or capable of being exercised by the High Court: see s 20(a)-(d) (repealed).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/74. Distribution of probate business between the Family Division and the Chancery Division.

74. Distribution of probate business between the Family Division and the Chancery Division.

Probate business was formerly assigned to the Probate, Divorce and Admiralty Division of the High Court¹. Although other divisions of the High Court had jurisdiction to entertain probate proceedings², they would in fact refrain from exercising such jurisdiction³.

With effect from 1 October 1971 the Probate, Divorce and Admiralty Division was renamed the Family Division and contentious probate business was transferred to the Chancery Division⁴. Non-contentious or common form probate business⁵ remains assigned to the Family Division⁶, but all other probate business is assigned to the Chancery Division⁷. References in this title to the 'probate court' are accordingly to the Family Division so far as non-contentious matters are concerned, to the Chancery Division so far as all other probate business is concerned, and to the county court where that court has probate jurisdiction⁸.

References in enactments or documents to the Probate, Divorce and Admiralty Division, the President of that division, the principal probate registry, the principal (or senior) probate registrar and a probate registrar are construed respectively, so far as necessary to preserve the effect of the enactment or document, as references to the Family Division and to the President, principal registry, principal registrar and a registrar of that division⁹.

1 See the Supreme Court of Judicature Act 1873 s 34 (repealed); and the Supreme Court of Judicature (Consolidation) Act 1925 s 56(3)(a) (as originally enacted) (repealed). As to the probate jurisdiction of the High Court see PARA 73 ante.

2 See *ibid* ss 4(4), 58 (repealed); and the Administration of Justice Act 1928 s 6 (repealed). The Supreme Court of Judicature (Consolidation) Act 1925 s 58(4), by virtue of which a cause or matter could not be assigned to the Probate, Divorce and Admiralty Division unless it fell within the former jurisdiction of the Probate Court or the Court for Divorce and Matrimonial Causes or was within the Admiralty, was repealed by the Administration of Justice Act 1970 s 54(3), Sch 11.

3 See *Pinney v Hunt* (1877) 6 ChD 98 at 101 per Jessel MR; *Bradford v Young* (1884) 26 ChD 656 at 667 per Pearson J; on appeal (1885) 29 ChD 617, CA. The existence of such jurisdiction was denied in *Priestman v Thomas* (1884) 9 PD 70 at 76; on appeal 9 PD 210 at 214, CA, per Cotton LJ.

4 See the Administration of Justice Act 1970 s 1 (as originally enacted); and the Administration of Justice Act 1970 (Commencement No 5) Order 1971, SI 1971/1244.

5 'Non-contentious or common form probate business' means the business of obtaining probate and administration where there is no contention as to the right to it, including: (1) the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated; (2) all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action; and (3) the business of lodging caveats against the grant of probate or administration: Supreme Court Act 1981 s 128. As to the distinction between non-contentious or common form business and contentious business see PARA 80 post.

6 *Ibid* s 61(1), Sch 1 para 3(b)(iv). As to the Family Division see generally COURTS.

7 *Ibid* Sch 1 para 1(h). As to the Chancery Division see PARA 274 et seq post; and see generally COURTS.

8 As to the contentious probate jurisdiction of the county court see PARA 275 post.

9 Administration of Justice Act 1970 s 1(6)(b). The principal probate registry is renamed the principal registry of the Family Division: s 1(1) (repealed).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/75. Functions of the probate court.

75. Functions of the probate court.

The principal duty of the probate court is to decide whether or not a document is entitled to probate as a testamentary paper¹; and who is entitled to be constituted the personal representative of the deceased, whether he died testate or intestate. A grant of probate or letters of administration, even though issued in common form out of a probate registry, is an order of the court² and cannot therefore as against a purchaser be invalidated on the ground of want of jurisdiction or of any concurrence, consent, notice or service, whether the purchaser has notice of any such want or not³. The probate court has no duty to construe a will except in so far as it may be necessary for these purposes⁴. The Chancery Division is the proper court of construction⁵. Nevertheless the probate court may, for the sake of avoiding undue multiplicity of legal proceedings, determine other questions in controversy arising out of the suit⁶, but no declaration of legitimacy can be made in a probate action⁷.

1 As to what papers are testamentary see PARA 103 note 1 post. As to the probate court see PARA 74 ante.

2 *Re Bridgett and Hayes' Contract* [1928] Ch 163 at 168.

3 Law of Property Act 1925 s 204(1).

4 See *Re Jones* (1927) 43 TLR 324 (holder of office named as executor; determination that holder at date of testator's death was intended); *Re Gates* [1928] P 128; on appeal [1928] P 178, CA ('all my money'; construction by consent in probate proceedings, varied in Chancery proceedings, *Re Gates, Gates v Cabell* [1929] 2 Ch 420, CA); *Re Dulong* (1929) 45 TLR 228 (grant of administration with will annexed to widow on footing that trusts of will failed); *Re Pesca* (1930) 74 Sol Jo 59 (determination that gift to rector of named church was gift to rector for the time being at testator's death so as to entitle such rector to grant of administration with will annexed; no determination whether gift created valid charitable trust); *Wightman v Cousins* [1931] NI 138; affd [1932] NI 61, CA (trusts of will already administered, not a matter of construction); *Re Hawksley's Settlement, Black v Tidy* [1934] Ch 384 (where opinions as to construction expressed in probate proceedings were treated as obiter in Chancery proceedings); *Re Thomas, Public Trustee v Davies* [1939] 2 All ER 567; *Re Alford* (1939) 83 Sol Jo 566; *Re Fawcett* [1941] P 85, [1941] 2 All ER 341 (cases where it was held in probate proceedings that there is jurisdiction to construe testamentary documents in order to decide which should be admitted to probate). See also PARA 103 post.

5 *Warren v Kelson* (1859) 1 Sw & Tr 290; cf *Re Tharp* (1878) 3 PD 76, CA. The former Probate, Divorce and Admiralty Division (see PARA 74 ante) would not make a declaration of trust on the footing of contract, as contracts and trusts were outside the matters assigned to it: *Re Heys, Walker v Gaskill* [1914] P 192 at 200 (a case of mutual wills). Cf *Betts v Doughty* (1879) 5 PD 26; *Stone v Hoskins* [1905] P 194. For consideration of the relationship between the court to which probate business is assigned and other divisions of the High Court see PARAS 20, 65-66, 73 ante, 218, 236 post. As to the effect on problems of jurisdiction of the transfer of contentious probate business to the Chancery Division cf para 274 post.

6 *Re Tharp* (1878) 3 PD 76, CA; *Vardy v Smith* (1932) 48 TLR 661; affd 49 TLR 36, CA (effect of foreign decree of divorce: see PARA 66 note 7 ante); *Re Fawcett* [1941] P 85, [1941] 2 All ER 341.

7 *Warter v Warter* (1890) 15 PD 35. It seems that the restriction applies even though the Family Law Act 1986 s 56 (as substituted) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 122) confers jurisdiction on the High Court to make declarations of legitimacy, because the proceedings in a probate action will not have been begun by petition as required by the Family Proceedings Rules 1991, SI 1991/1247, r 3.13 (as amended), r 3.14 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 122): see *Knowles v A-G* [1951] P 54 at 63-64, [1950] 2 All ER 6 at 10-11. An issue of legitimacy may be decided, however, in other proceedings: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 122.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

75 Functions of the probate court

NOTE 7--SI 1991/1247 r 3.13 substituted: SI 2001/821.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/76. Powers over testamentary papers.

76. Powers over testamentary papers.

The court has jurisdiction, where it appears that any person has in his possession, custody or power any document which is or purports to be a testamentary document, whether or not any legal proceedings are pending¹, to issue a subpoena requiring him to bring in the document in such manner as the court may in the subpoena direct². Alternatively, where it appears that there are reasonable grounds for believing that any person has knowledge of any document which is or purports to be a testamentary document, the High Court may, whether or not any legal proceedings are pending, order him to attend for the purpose of being examined in open court³. The court may require any person who is before it in compliance with such an order to answer any question relating to the document concerned⁴ and, if appropriate, order him to bring in the document in such manner as the court may direct⁵. Any person who, having been required by the court to do so, fails to attend for examination, answer any question or bring in any document is guilty of contempt of court⁶. The person required to attend for the purpose of being examined is entitled to conduct money⁷ and to be represented by counsel⁸. A solicitor holding a will for a client has no privilege in the matter, and may be ordered to bring it in⁹. It is doubtful if a subpoena can issue for service out of the jurisdiction¹⁰.

A person who dishonestly, with a view to gain to himself or another or with intent to cause loss to another, destroys, defaces or conceals any will or other testamentary document filed or deposited in any court of justice is on conviction on indictment liable to imprisonment for a term not exceeding seven years¹¹.

1 As to the duty of parties in testamentary causes to file affidavits of scripts and to lodge scripts in chambers see PARA 279 post.

2 Supreme Court Act 1981 s 123. See also *Re Shepherd* [1891] P 323; and PARA 290 note 4 post. Since the enactment of the CPR, a subpoena is now known as a witness summons: see PARA 37 note 3 ante.

An application under the Supreme Court Act 1981 s 123, in a case where there is no probate action pending, for the issue by a district judge or registrar (see PARA 27 note 7 ante) of a subpoena to bring in a will must be supported by an affidavit setting out the grounds of the application, and if any person served with the subpoena denies that the will is in his possession or control he may file an affidavit to that effect in the registry from which the subpoena issued: Non-Contentious Probate Rules 1987, SI 1987/2024, r 50(2) (amended by SI 1991/1876). 'Registry' means the principal registry of the Family Division or a district probate registry: Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1). For the meaning of 'district judge' see PARA 27 note 6 ante. See also *Re Emmerson, Rawlings v Emmerson* (1887) 57 LJP 1, CA.

Any application in a probate claim for the issue of a witness summons under the Supreme Court Act 1981 s 123 must be for the issue of a witness summons requiring a person to bring into the relevant office a will or other testamentary paper: CPR Pt 49; *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 14.3. As to the CPR see PARA 37 note 3 ante. 'Probate claim' means a claim in respect of any contentious matter arising in connection with an application for the grant or revocation of probate or letters of administration and includes a claim for an order pronouncing for or against the validity of an alleged will; and 'probate proceedings' means the proceedings in which a probate claim is brought: para 1.2(i). 'Relevant office' means: (1) in the case of High Court proceedings in a Chancery district registry, that registry; (2) in the case of any other High Court proceedings, Chancery Chambers at the Royal Courts of Justice, Strand, London; and (3) in the case of county court proceedings, the office of the county court in question: para 1.2(ii). An application under the Supreme Court Act 1981 s 123 should be made to a master or district judge: para 14.5. Any person against whom a witness summons is issued and who denies that the will or other testamentary paper referred to in the witness summons is in his possession or under his control may file an affidavit or witness statement to that effect: para 14.6.

3 Supreme Court Act 1981 s 122(1). An application under s 122 for an order requiring a person to attend for examination may, unless a probate action has been commenced, be made to a district judge or registrar by summons which must be served on every such person: Non-Contentious Probate Rules 1987, SI 1987/2024, r 50(1) (amended by SI 1991/1876). See also *Re Laws* (1872) LR 2 P & D 458; cf *Banfield v Pickard* (1881) 6 PD 33.

Any application in a probate claim for an order under the Supreme Court Act 1981 s 122 must be for an order requiring a person to bring a will or other testamentary paper into the relevant office (see note 2 supra) or to attend in court for examination: CPR Pt 49; *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 14.1. An application under the Supreme Court Act 1981 s 122 must be made to a master or district judge: para 14.5.

4 Supreme Court Act 1981 s 122(2)(a).

5 Ibid s 122(2)(b).

6 Ibid s 122(3). See also *Simmons v Dean* (1858) 27 LJP & M 103; cf *Parkinson v Thornton* (1867) 37 LJP & M 3 (order for attendance in court rather than committal to be made in first instance). As to contempt of court generally see CONTEMPT OF COURT.

7 See *Re Harvey* [1907] P 239, commenting upon *Re Wyatt* [1898] P 15. As to conduct money generally see CIVIL PROCEDURE vol 11 (2009) PARA 1058.

8 See *Re Cope* (1867) 36 LJP & M 83.

9 *Re Harvey* [1907] P 239 at 240.

10 See Tristram and Coote's Probate Practice (28th Edn) 612. As to the administration of estates involving a conflict of laws see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 432 et seq.

11 See the Theft Act 1968 s 20(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 317.

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72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

76 Powers over testamentary papers

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES 2, 3--*Practice Direction--Contentious Probate Proceedings* (1999) PD 49A revoked. Now, any party applying for an order under the Senior Courts Act 1981 s 122 must serve the application notice on the person against whom the order is sought: *Practice Direction--Probate* PD 57 para 7.1. An application for the issue of a witness summons under the Senior Courts Act 1981 s 123, (1) may be made without notice; and (2) must be supported by written evidence setting out the grounds of the application: *Practice Direction--Probate* PD 57 para 7.2. An application under either provision should be made to a master or district judge: para 7.3. A person against whom a witness summons is issued under the Senior Courts Act 1981 s 123 who denies that the testamentary document referred to in the witness summons is in his possession or under his control may file written evidence to that effect: *Practice Direction--Probate* PD 57 para 7.4. For the meaning of 'testamentary document' see PARA 279. See also *Caudle v LD Law Ltd* [2008] EWHC 374 (QB), [2009] 2 All ER 1020.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/77. Jurisdiction of district judges and masters.

77. Jurisdiction of district judges and masters.

Where the rules of court provide for a court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed by a master or district judge¹.

A district judge² may, during the long vacation, exercise all powers exercisable under the non-contentious probate rules³ by a judge in chambers⁴. An appeal against a decision or requirement of a district judge of the principal registry or registrar is made by summons to a judge⁵.

¹ See CPR 2.4. See also CPR Sch 1 RSC Ord 50 r 9 and CPR Sch 1 RSC Ord 51 r 2. As to the CPR see PARA 37 note 3 ante.

² For the meaning of 'district judge' see PARA 27 note 6 ante.

³ ie the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended): see r 64 (as amended: see note 4 infra).

⁴ Ibid rr 2.1, 64 (both amended by SI 1991/1876). For instances of applications which are made to the district judge or registrar on summons see PARA 98 et seq post.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 65(1) (amended by SI 1991/1876). See also PARA 101 post. As to registrars see PARA 27 note 7 ante. A registrar has no power to set aside the order of another registrar in a co-ordinate jurisdiction: see *Re Mathew* [1984] 2 All ER 396, [1984] 1 WLR 1011.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

77 Jurisdiction of district judges and masters

NOTE 1--CPR Sch 1 RSC Ord 50 revoked: SI 2001/2792. CPR Sch 1 RSC Ord 51 r 2 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/78. Co-operation between the probate registries and the courts.

78. Co-operation between the probate registries and the courts.

On the issue of a claim form¹ by which a probate claim² is begun, the relevant office³ will send a notice to the principal registry of the Family Division requesting that all testamentary scripts and other relevant documents in the principal registry or any district probate registry be sent to the relevant office⁴. A copy of every order made for the rectification of a will⁵ must be sent to the principal registry for filing, and a memorandum of the order must be indorsed on or permanently annexed to, the grant under which the estate is administered⁶.

1 Under the CPR the claim form is the main method of starting proceedings in the High Court and the county court (in place of the former writ and summons). As to the CPR see PARA 37 note 3 ante. As to the commencement of proceedings by claim form see CPR Pt 7. In *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A, 'claim form' means a claim form by which a probate claim is begun: para 1.2(i).

2 For the meaning of 'probate claim' see PARA 76 note 2 ante.

3 For the meaning of 'relevant office' see PARA 76 note 2 ante.

4 CPR Pt 49; *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 2.3. As to testamentary scripts see PARA 279 post.

5 See PARA 141 post.

6 CPR Pt 49; *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 17.2.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

78 Co-operation between the probate registries and the courts

NOTE 1--*Practice Direction--Contentious Probate Proceedings* (1999) PD 49A revoked. As to the procedure relating to probate claims generally see now CPR Pt 57 (added by SI 2001/1388); and *Practice Direction--Probate* (2001) PD 57.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(i) Jurisdiction/79. Jurisdiction of district registrars.

79. Jurisdiction of district registrars.

District probate registries have been established in the provinces¹. Applications for grants of probate or administration and for the revocation of grants may be made to a district probate registry². Any grant made by a district probate registrar³ must be made in the name of the High Court under the seal used in the registry⁴. However, a district probate registrar⁵ has no power to make a grant in any case in which there is contention until the contention is disposed of⁶, or in any case in which it appears to him that a grant ought not to be made without the directions of a judge of the High Court or a district judge⁷.

Subject to probate rules⁸, no grant in respect of the estate⁹, or part of the estate, of a deceased person may be made out of any district probate registry on any application if, at any time before the making of a grant, it appears to the registrar concerned that some other application has been made in respect of that estate or, as the case may be, that part of it, and has not been either refused or withdrawn¹⁰. Any person aggrieved by a decision or requirement of a registrar may appeal by summons to a judge¹¹.

1 The Court of Probate Act 1857 s 13, Sch A (repealed) established district registries throughout England. For the present scheme of district registries see the Supreme Court Act 1981 s 104(1); the District Probate Registries Order 1982, SI 1982/379 (amended by SI 1994/1103; and SI 1994/3079); and COURTS. A number of sub-registries were established by virtue of the Non-Contentious Probate Rules 1954, SI 1954/796, r 2A (repealed). The functions of a sub-registry are to receive applications for grants (see PARAS 126-127 post) and search, and record the results of searches, of the index of pending applications maintained by the senior district judge: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 57 (substituted by SI 1998/1903).

2 Supreme Court Act 1981 s 105(b). 'Grant' means a grant of probate or administration: s 128. For the meaning of 'administration' see PARA 18 note 8 ante.

3 As to the appointment, qualifications, etc of district probate registrars see COURTS. For the meanings of 'grant' and 'registrar' see PARA 27 note 7 ante.

A registrar to whom any application is made under the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended), may order the transfer of the application to another district judge or registrar having jurisdiction: r 62 (amended by SI 1991/1876). A registrar may hear and dispose of such an application on behalf of any other registrar by whom the application would otherwise have been heard, if that other registrar so requests or an application in that behalf is made by a party making an application under the rules; and where the circumstances require it, the registrar must, without the need for any such request or application, hear and dispose of the application: Non-Contentious Probate Rules 1987, SI 1987/2024, r 62A (added by SI 1998/1903). For the meaning of 'district judge' see PARA 27 note 6 ante.

4 Supreme Court Act 1981 s 106(1).

5 See note 2 supra.

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 7(1)(a) (amended by SI 1991/1876).

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 7(1)(b) (amended by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante. In any case in which it appears that a grant ought not to be made without the directions of a judge of the High Court or a district judge, the registrar must send a statement of the matter in question to the principal registry for directions: Non-Contentious Probate Rules 1987, SI 1987/2024, r 7(2) (amended by SI 1991/1876). A district judge may either confirm that the matter be referred to a judge of the High Court and give directions accordingly or may direct the registrar to proceed with the matter in accordance with such instructions as are deemed necessary, which may include a direction to take no further action in relation to the matter: Non-Contentious Probate Rules 1987, SI 1987/2024, r 7(3) (amended by SI 1991/1876).

8 For the meaning of 'probate rules' see PARA 16 note 6 ante.

9 For the meaning of 'estate' see PARA 16 note 5 ante.

10 Supreme Court Act 1981 s 107.

11 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 65 (amended by SI 1991/1876); and PARA 101 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

79 Jurisdiction of district registrars

NOTE 1--1981 Act s 104(1) amended, s 104(3) added: Constitutional Reform Act 2005 Sch 4 para 144. SI 1982/379 further amended: Lord Chancellor (Transfer of Functions and Supplementary Provisions) Order 2006, SI 2006/680.

80. Distinction between non-contentious and contentious business.

Probate business is divided into non-contentious or common form business, and contentious business. Common form business consists of the obtaining of grants of probate and letters of administration where there is no contention as to the right to obtain them, including the passing of probates and administrations through the court in contentious cases when the contest is terminated, and all business of a non-contentious nature in matters of testacy and intestacy, not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration¹. All other business of the court, except the warning of caveats, is contentious².

In practice, since the transfer of contentious jurisdiction to the Chancery Division, the criterion is the issue of the claim form. All matters before the issue of a claim form come before the Family Division and all matters after the issue come before the Chancery Division until the contest is terminated by final order or consent³.

¹ See the definition of 'non-contentious, or common form probate business' for the purposes of the Supreme Court Act 1981 Pt V (ss 105-128) (as amended) set out in s 128 (see PARA 74 note 5 ante); and see Pt V (as amended) for the provisions of that Act relating to probate causes and matters. The non-contentious jurisdiction remains in the Family Division: see PARA 74 ante. As to the lodging of caveats see PARA 86 post.

² Contentious business is assigned to the Chancery Division: see PARAS 74 ante, 274 post. As to the warning of caveats see PARA 87 post.

³ See PARA 74 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/81. Rules and orders for non-contentious business.

(ii) Practice and Procedure

81. Rules and orders for non-contentious business.

Practice in non-contentious business¹ is regulated by rules and orders² made by the President of the Family Division with the concurrence of the Lord Chancellor³, also to some extent by the practice of the former Prerogative Court of Canterbury⁴, and by directions issued by the Senior District Judge⁵. The Civil Procedure Rules do not apply to non-contentious or common form

probate proceedings⁶ except to the extent that they are applied to those proceedings by another enactment⁷. The Rules of the Supreme Court 1965⁸ apply to non-contentious probate subject to the provisions of the probate rules and any enactment⁹.

1 Non-contentious business remains in the Family Division: see PARA 74 ante. As to the distinction between non-contentious business and contentious business see PARA 80 ante.

2 The present rules in force are the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended). Where the deceased died before 1 January 1926, the person or persons entitled to a grant, subject to the provisions of any enactment, must be determined in accordance with the principles and rules under which the court would have acted at the date of death: r 23.

3 The President of the Family Division may, with the concurrence of the Lord Chancellor, make rules of court ('probate rules') for regulating and prescribing the practice and procedure of the High Court with respect to non-contentious or common form probate business: Supreme Court Act 1981 s 127(1). For the meaning of 'non-contentious or common form probate business' see PARA 74 note 5 ante. As to the distinction between non-contentious or common form business and contentious business see PARA 80 ante. Without prejudice to the generality of s 127(1), probate rules may make provision for regulating the classes of persons entitled to grants of probate or administration in particular circumstances and the relative priorities of their claims: s 127(2). Probate rules are made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and the Statutory Instruments Act 1946 applies to a statutory instrument containing probate rules in like manner as if they had been made by a Minister of the Crown: s 127(3). For the meaning of 'non-contentious or common form probate business' see PARA 74 note 5 ante. For the meaning of 'administration' see PARA 18 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477.

4 See *Druce v Young*[1899] P 84 at 101. As to the Prerogative Court of Canterbury see PARAS 72-73 ante.

5 See eg paras 84 note 3, 86 note 11, 91 note 5 post.

6 See PARA 80 ante.

7 CPR 2.1(2). As to the CPR see PARA 37 note 3 ante.

8 Ie as they were in force immediately before 26 April 1999.

9 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 3(1) (as substituted); and PARA 83 note 15 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

81 Rules and orders for non-contentious business

NOTE 3--Supreme Court Act 1981 s 127(1) amended, s 127(3) repealed: Constitutional Reform Act 2005 Sch 1 para 12(2), (3), Sch 18 Pt 1. As from 1 October 2009 (see SI 2009/1604) 1981 Act cited as Senior Courts Act 1981: 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/82. Fees.

82. Fees.

Orders have been made¹ laying down the fees which are to be taken in non-contentious² and contentious business³ respectively.

In general, on an application for a grant a fixed fee is payable where the value of the estate exceeds a certain sum⁴. Where it appears to the Lord Chancellor that the payment of prescribed fee would, owing to the exceptional circumstances of the particular case, involve undue hardship, he may reduce or remit the fee in that case⁵.

¹ See under the Supreme Court Act 1981 s 130: see COURTS.

² See the Non-Contentious Probate Fees Order 1999, SI 1999/688 (which came into force on 26 April 1999: see art 1). For the fees to be taken in the principal registry of the Family Division and in each district registry see art 3, Sch 1.

³ See the Supreme Court Fees Order 1999, SI 1999/687 (which came into force on 26 April 1999: see art 1); and COURTS. For the fees to be taken in the Supreme Court see art 3, Sch 1; and COURTS. The Order does not apply to non-contentious probate business: art 4(a).

⁴ On an application for a grant where the value of the estate exceeds £5,000 the fee payable is £50: Non-Contentious Probate Fees Order 1999, SI 1999/688, art 3, Sch 1 Fee 1. 'Grant' means a grant of probate or letters of administration: art 2(d). In determining the value of any personal estate there is to be excluded the value of a death gratuity payable under the Judicial Pensions Act 1981 s 17(2) or the Judicial Pensions and Retirement Act 1993 (see COURTS), or payable to the personal representatives of a deceased civil servant by virtue of a scheme made under the Superannuation Act 1972 s 1 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 567); Non-Contentious Probate Fees Order 1999, SI 1999/688, art 4. An additional fee of £80 may be payable on an application for a grant by a personal applicant: see Sch 1 Fee 2. Where the application is for a duplicate grant or for a second or subsequent grant (including one following a revoked grant) in respect of the same deceased person, other than a grant preceded only by a grant limited to settled land, trust property or part of the estate, a fixed fee of £15 is payable: Sch 1 Fee 3.

⁵ Ibid art 5(1). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477. Where by any convention entered into by Her Majesty with any foreign power it is provided that no fee is to be required to be paid in respect of any proceedings, the fees specified in the Non-Contentious Probate Fees Order 1999, SI 1999/688, must not be taken in respect of those proceedings: art 5(2). Where any application for a grant is withdrawn before the issue of a grant, a registrar may reduce or remit a fee: art 5(3).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

82 Fees

TEXT AND NOTES--SI 1999/688 revoked: SI 2004/3123. As to fees in respect of non-contentious business see now the Non-Contentious Probate Fees Order 2004, SI 2004/3120 (amended by SI 2007/2174, SI 2008/2854, SI 2009/1497).

NOTE 2--SI 1999/688 art 3, Sch 1 now SI 2004/3120 art 2, Sch 1 (amended by SI 2008/2854).

NOTE 3--SI 1999/687 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see CIVIL PROCEDURE vol 11 (2009) PARA 87). As to fees see now SI 2004/3120 art 2, Schs 1, 1A (Sch 1A added by SI 2007/2174, substituted by SI 2009/1497; SI 2004/3120 Sch 1 amended by SI 2008/2854)).

NOTE 4--On an application for a grant where the value of the estate exceeds £5,000 the fee payable is now £40: SI 2004/3120 Sch 1 Fee 1. SI 1999/688 arts 2(d), 4 now SI 2004/3120 art 1(2)(d), 3. Additional fee now £50: SI 2004/3120 Sch 1 Fee 2. SI 1999/688 Sch 1 Fee 3 now SI 2004/3120 Sch 1 Fee 3.

TEXT AND NOTE 5--Where it appears to the Lord Chancellor that an application for a grant is in respect of a death occurring as a result of the earthquake and tsunami in the Indian Ocean on 26 December 2004, he must remit any fee prescribed by SI 2004/3120 in that case: Non-Contentious Probate Fees (Indian Ocean Tsunami) Order 2005, SI 2005/266. Where it appears to the Lord Chancellor that an application for a grant is in respect of a death occurring as a result of another person's detonation of a bomb in London on 7 July 2005, or a death occurring as a result of action taken in a police operation following another person's attempted detonation of a bomb in London on 21 July 2005, he must remit any fee prescribed by SI 2004/3120 in that case: Non-Contentious Probate Fees (London Terrorist Bombings) Order 2005, SI 2005/3359.

NOTE 5--SI 1999/688 art 5(1) now SI 2004/3120 art 4 (art 4 substituted by SI 2007/2174). SI 1999/688 art 5(2), (3) now SI 2004/3120 art 6(1), (2).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/83. Costs in non-contentious business.

83. Costs in non-contentious business.

For work done in respect of non-contentious or common form probate business¹ a solicitor is entitled to charge and be paid such sum as may be fair and reasonable² to both the solicitor and entitled person³ having regard to all the circumstances of the case and in particular to⁴:

- (1) the complexity of the matter or the difficulty or novelty of the questions raised⁵;
- (2) the skill, labour, specialised knowledge and responsibility involved⁶;
- (3) the time spent on the business⁷;
- (4) the number and importance of the documents prepared or perused, without regard to length⁸;
- (5) the place where and the circumstances in which the business or any part of it is transacted⁹;
- (6) the amount or value of any money or property involved¹⁰;
- (7) whether any land involved is registered land¹¹;
- (8) the importance of the matter to the client¹²; and

(9) the approval (express or implied) of the entitled person or the express approval of the testator to the solicitor undertaking all or any part of the work giving rise to the costs, or the amount of the costs¹³.

The entitled person may require the solicitor to obtain a remuneration certificate from the Council of the Law Society in respect of a bill which has been delivered where the costs are not more than £50,000¹⁴. The certificate must state what sum, in the opinion of the Council, would be a fair and reasonable charge for the business covered by the bill (whether it be the sum charged or a lesser sum)¹⁵. This right is without prejudice to the statutory provisions¹⁶ which provide for the taxation by the High Court of a solicitor's bill on the application of the client or the solicitor or a person who is liable to either of them to pay the bill or, if a trustee or personal representative is liable to pay the bill, on the application of a person interested in any property out of which the bill is paid or payable¹⁷.

If the sum certified by the Council of the Law Society as fair and reasonable is less than the sum charged, then, in the absence of taxation under the statutory provisions, it is the sum payable¹⁸. Before the solicitor brings proceedings to recover costs against a client, he must, unless the costs have been taxed under the statutory provisions, have drawn the client's attention in writing to his right to require the solicitor to obtain a certificate from the Law Society, to the general statutory provisions¹⁹ with regard to the taxation of costs, and that the solicitor may charge interest on the outstanding amount of the bill²⁰.

Every bill of costs (other than a bill delivered by a solicitor to his client which falls to be taxed under the Solicitors Act 1974²¹) must be referred for taxation²² where the order for taxation was made by a district judge²³, to a district judge, or to a taxing officer of the principal registry authorised to tax costs²⁴, or where the order for taxation was made by a registrar²⁵, to that registrar²⁶.

On any application dealt with by him on summons, the registrar has full power to determine by whom and to what extent the costs are to be paid²⁷.

1 As to the distinction between non-contentious business and contentious business see PARA 80 ante. As to legal aid in non-contentious business see PARA 273 post.

2 See *Maltby v DJ Freeman & Co* [1978] 2 All ER 913, [1978] 1 WLR 431.

3 For the definition of 'entitled person', which includes the client of the solicitor, see the Solicitors' (Non-Contentious Business) Remuneration Order 1994, SI 1994/2616, art 2; and LEGAL PROFESSIONS vol 66 (2009) PARA 937.

4 See *ibid* art 3; and LEGAL PROFESSIONS vol 66 (2009) PARA 937. If a solicitor deducts his costs from monies held for or on behalf of a client or an estate in satisfaction of a bill and an entitled person objects in writing to the amount of the bill within the prescribed time, the solicitor must immediately inform him in writing of the matters specified in art 8, unless he has already done so: see art 7; and LEGAL PROFESSIONS vol 66 (2009) PARAS 938-939.

5 *Ibid* art 3(a).

6 *Ibid* art 3(b).

7 *Ibid* art 3(c).

8 *Ibid* art 3(d).

9 *Ibid* art 3(e).

10 *Ibid* art 3(f).

11 *Ibid* art 3(g).

12 *Ibid* art 3(h).

13 Ibid art 3(i).

14 See ibid art 4(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 938.

15 See ibid art 4(2); and LEGAL PROFESSIONS vol 66 (2009) PARA 938. The client is not entitled to require the solicitor to obtain a certificate from the Law Society: (1) after the bill has been delivered and paid by the client (other than by deduction); (2) where a bill has been delivered, after the expiry of one month from the date on which the client was informed of certain matters or from delivery of the bill if later; (3) after the solicitor and client have entered into a non-contentious business agreement in accordance with the Solicitors Act 1974 s 57 (as amended); (4) after the court has ordered the bill to be taxed; or (5) if the Solicitors' (Non-Contentious Business) Remuneration Order 1994, SI 1994/2616, art 11(2) applies: see art 9; and LEGAL PROFESSIONS vol 66 (2009) PARA 938. On requiring a solicitor to obtain a remuneration certificate the client may have to contribute to the costs: see art 11(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 940. An entitled third party may not require a solicitor to obtain a remuneration certificate after certain prescribed times, or after a court has ordered the bill to be taxed: see art 10; and LEGAL PROFESSIONS vol 66 (2009) PARA 938.

16 See the Solicitors Act 1974 ss 70-72: see LEGAL PROFESSIONS vol 66 (2009) PARA 971 et seq.

17 See the Solicitors' (Non-Contentious Business) Remuneration Order 1994, SI 1994/2616, art 4(1); the Solicitors Act 1974 ss 70-72; and LEGAL PROFESSIONS.

18 See the Solicitors' (Non-Contentious Business) Remuneration Order 1994, SI 1994/2616, art 4(2); and LEGAL PROFESSIONS vol 66 (2009) PARA 938. A solicitor must immediately pay to the entitled person any refund which may be due unless he has applied for an order for taxation within one month of receipt by him of the remuneration certificate: see art 13(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 940.

19 See note 16 supra.

20 See the Solicitors' (Non-Contentious Business) Remuneration Order 1994, SI 1994/2616, arts 6, 8; and LEGAL PROFESSIONS vol 66 (2009) PARAS 938-939.

21 See LEGAL PROFESSIONS vol 66 (2009) PARA 967 et seq.

22 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 60 (substituted by SI 1991/1876).

23 For the meaning of 'district judge' see PARA 27 note 6 ante.

24 Non-Contentious Probate Rules 1987, SI 1987/2024, r 60(a) (as substituted: see note 22 supra). A taxing officer is authorised to tax costs in accordance with RSC Ord 62 r 19: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 60(a) (as so substituted).

Subject to the provisions of the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended) and to any enactment, the Rules of the Supreme Court 1965 as they were in force immediately before 26 April 1999 apply, with any necessary modifications to non-contentious probate matters, and any reference in the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended) to the Rules of the Supreme Court are to be construed accordingly: Non-Contentious Probate Rules 1987, SI 1987/2024, r 3(1) (r 3 substituted by SI 1999/1015). Nothing in RSC Ord 3 prevents time from running in the Long Vacation: Non-Contentious Probate Rules 1987, SI 1987/2024, r 3(2) (as so substituted).

25 For the meaning of 'registrar' see PARA 27 note 7 ante.

26 Non-Contentious Probate Rules 1987, SI 1987/2024, r 60(b) (as substituted: see note 22 supra). If on a taxation the taxing officer allows less than one half of the costs, he must bring the facts of the case to the attention of the Council of the Law Society: see the Solicitors' (Non-Contentious Business) Remuneration Order 1994, SI 1994/2616, art 5(1).

27 Non-Contentious Probate Rules 1987, SI 1987/2024, r 63 (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

83 Costs in non-contentious business

TEXT AND NOTES--SI 1994/2616 replaced: Solicitors' (Non-Contentious Business) Remuneration Order 2009, SI 2009/1931.

NOTE 2--See *Jemma Trust Co Ltd v Liptrott* [2003] EWCA Civ 1476, [2004] 1 All ER 510, [2004] 1 WLR 646.

TEXT AND NOTES 21-27--SI 1987/2024 r 60 substituted: SI 2003/185.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/84. Standing searches.

84. Standing searches.

Any person who wishes to be notified of the issue of a grant¹ may enter a standing search for the grant by lodging at, or sending by post to any registry² or sub-registry, a notice in the prescribed form³. A person who has entered a standing search will be sent an office copy of any grant which corresponds with the particulars given on the completed form and which (1) issued not more than 12 months before the entry of the standing search; or (2) issues within a period of six months after the entry of the standing search⁴.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 For the meaning of 'registry' see PARA 76 note 2 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 43(1) (substituted by SI 1991/1876). For the prescribed form see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 43(1), Sch 1 Form 2. This procedure is of assistance to persons who wish to take action against an estate or commence proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 (see PARA 665 et seq post) or similar legislation when a personal representative is constituted.

In order to facilitate the operation of standing searches and caveats (see PARA 86 post) and to ensure the accuracy of probate records, it has been directed that in all instances where the deceased died in the United Kingdom and the death has been recorded in the Register of Deaths: (1) the name and dates of birth and death of the deceased as recorded in the register must be included in the oath lodged in support of an application made through a solicitor or probate practitioner for a grant of representation (see PARA 128 post); (2) the name and date of death of the deceased as recorded in the register must be included in the notice lodged for a standing search or caveat; and (3) in any case where the name by which the deceased was known differs from that recorded in the register, that name must also be included in the oath or notice, as the case may be: *Practice Direction* [1999] 1 All ER 832. The fee on an application for a standing search to be carried out in an estate, for each period of six months including the issue of a copy grant and will, if any, irrespective of the number of pages is £5: Non-Contentious Probate Fees Order 1999, SI 1999/688, art 3, Sch 1 Fee 5.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 43(2). Where an applicant wishes to extend the period of six months, he or his solicitor or probate practitioner may lodge at, or send by post to, the registry or sub-registry at which the standing search was entered, written application for extension: r 43(3)(a) (amended by SI 1991/1876; and SI 1998/1903). An application for extension must be lodged, or received by post, within the last month of the said period of six months, and the standing search is then effective for an additional period of six months from the date on which it was due to expire: Non-Contentious Probate Rules 1987, SI

1987/2024, r 43(3)(b). 'Probate practitioner' means a person to whom the Solicitors Act 1974 s 23(1) does not apply by virtue of s 23(2): Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1). As to probate practitioners see PARA 126 post. A standing search which has been extended may be further extended by the filing of a further application for extension subject to the same conditions as set out in r 43(3)(b): r 43(3)(c).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

84 Standing searches

NOTE 3--SI 1999/688 revoked: SI 2004/3123. SI 1999/688 art 3, Sch 1 Fee 5 now the Non-Contentious Probate Fees Order 2004, SI 2004/3120, art 2, Sch 1 Fee 5.

NOTE 4--In definition of 'probate practitioner', after 's 23(2)' insert 'or s 55 of the Courts and Legal Services Act 1990': SI 1987/2024 r 2(1) amended by SI 2004/2985.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/85. Summonses to accept or refuse probate.

85. Summonses to accept or refuse probate.

The High Court has power to summon any person named as executor in a will to prove or renounce probate of the will, and to do such other things concerning the will as the court had power to order such a person to do immediately before 1982¹. If an executor, without an express renunciation, refrains from appearing to a citation to take probate, his rights in respect of the executorship wholly cease, and the representation devolves as if he had not been appointed executor².

¹ Supreme Court Act 1981 s 112. Before 1982 the High Court had power to do things concerning the will as were customary before 1926: see the Supreme Court of Judicature (Consolidation) Act 1925 s 159 (repealed). It is immaterial to this power whether or not a claim form has been issued (ie whether the matter is contentious or non-contentious), but the issue of a claim form will affect the jurisdiction in that before the issue of a claim form the power will be exercised by the Family Division and after issue of the claim form by the Chancery Division: see PARA 80 ante.

² Administration of Estates Act 1925 s 5(ii). As to citations to take probate see further PARA 91 et seq post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/86. Caveats.

86. Caveats.

Any person who wishes to show cause against the sealing of a grant¹ may enter a caveat² in the principal registry of the Family Division or in any district probate registry or sub-registry³. A person, called the caveator, who wishes to enter a caveat, or a solicitor or probate practitioner⁴ on his behalf, may effect entry of a caveat⁵ by completing the prescribed form⁶ in the appropriate book at any registry or sub-registry⁷, or by sending by post at his own risk a notice in the prescribed form to any registry or sub-registry and the proper officer must provide an acknowledgment of the entry of the caveat⁸. The caveat must contain the deceased's name and dates of birth and death⁹ and late address, the caveator's name (even where the caveat is entered on his behalf by a solicitor or probate practitioner) and an address for service within England and Wales¹⁰.

When a caveat is entered in a district probate registry, the district probate registrar must immediately send a copy to the principal registry of the Family Division to be entered among the caveats in that registry¹¹. Except as otherwise provided¹², a caveat remains effective for a period of six months from the date on which it is entered, and where a caveator wishes to extend the period, he or his solicitor or probate practitioner may lodge at, or send by post to, the registry or sub-registry at which the caveat was entered a written application for extension¹³. The district judge or registrar must not allow any grant to be sealed (other than a grant *ad colligenda bona*¹⁴ or to an administrator pending suit¹⁵) if he has knowledge of an effective caveat in respect of it¹⁶.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 For the prescribed form of caveat see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(2), Sch 1 Form 3 (amended by SI 1998/1903). The fee for the entry of a caveat is £15: Non-Contentious Probate Fees Order 1999, SI 1999/688, art 3, Sch 1 Fee 4.

3 Supreme Court Act 1981 s 108(1); Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(1) (amended by SI 1991/1876). For the meaning of 'registry' see PARA 76 note 2 ante. The actual entry of a caveat is merely a ministerial act: *Re Panton* [1901] P 239. The caveat constitutes a direction that no grant should be sealed in the deceased's estate without notice to the caveator.

4 For the meaning of 'probate practitioner' see PARA 84 note 4 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(2) (amended by SI 1998/1903).

6 See note 2 supra.

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(2)(a).

8 Ibid r 44(2)(b).

9 Ie the name and dates of birth and death of the deceased as recorded in the Register of Deaths (where the death is so recorded), and any name by which the deceased was known which differed from that recorded in the register: see *Practice Direction* [1999] 1 All ER 832; and PARA 84 note 3 ante. As to registration of deaths see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 561 et seq.

10 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 49, Sch 1 Form 3 (as amended: see note 2 supra).

11 Supreme Court Act 1981 s 108(2). An index of caveats entered in any registry or sub-registry must be maintained and upon receipt of an application for a grant, the registry or sub-registry at which the application is made must cause a search of the index to be made and the appropriate district judge or registrar must be notified of the entry of a caveat against the sealing of a grant for which the application has been made: Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(4) (substituted by SI 1998/1903). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. The index is currently maintained at the Leeds District Probate Registry: see *Practice Direction* [1988] 3 All ER 544.

12 Ie by the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 44, 45 or 46 (all as amended) (see PARA 790 et seq post): see r 44(3)(a) (as amended: see note 13 infra).

13 Ibid r 44(3)(a) (amended by SI 1998/1903). An application for extension must be lodged, or received by post, within the last month of the said period of six months, and the caveat is then effective (save as otherwise provided by the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44 (as amended)) for an additional period of six months from the date on which it was due to expire: r 44(3)(b). A caveat which has been extended may be further extended by the filing of a further application for extension subject to the same conditions as set out in r 44(3)(b): r 44(3)(c). The fee for the extension of a caveat is £15: Non-Contentious Probate Fees Order 1999, SI 1999/688, art 3, Sch 1 Fee 4.

14 As to grants ad colligenda bona see PARA 223 post.

15 Ie under the Supreme Court Act 1981 s 117 (see PARA 216 post): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(1) (as amended: see note 3 supra).

16 Ibid r 44(1) (as amended: see note 3 supra). See also *Re Clore* [1982] Fam 113, [1982] 2 WLR 314; approved [1982] Ch 456, [1982] 3 All ER 419, CA. No caveat, however, operates to prevent the sealing of a grant on the day on which the caveat is entered: Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(1) (as so amended).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

86 Caveats

NOTES 2, 13--SI 1999/688 revoked: SI 2004/3123. SI 1999/688 art 3, Sch 1 Fee 4 now the Non-Contentious Probate Fees Order 2004, SI 2004/3120, art 2, Sch 1 Fee 4.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/87. Warnings.

87. Warnings.

If a caveat has been entered¹, any person claiming to have an interest in the estate may cause to be issued from the nominated registry² a warning in the prescribed form against the caveat³. The person warning must state his interest in the estate of the deceased and must require the caveator⁴ to give particulars of any contrary interest in the estate⁵. The warning must contain an address for service in England and Wales⁶. The warning or a copy of it must be served on the caveator forthwith⁷.

1 See PARA 86 ante.

2 'Nominated registry' means the registry nominated for the purpose of the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44 (as amended) by the senior district judge or in the absence of any such nomination the Leeds District Probate Registry: r 44(15) (added by SI 1998/1903). The 'senior district judge' means the Senior District Judge of the Family Division or, in his absence, the senior of the district judges in attendance at the principal registry: Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1) (definition added by SI 1991/1876). For the meaning of 'registry' see PARA 76 note 2 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(5) (amended by SI 1998/1903). For the form of warning see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(5), Sch 1 Form 4 (amended by SI 1991/1876; and SI 1998/1903).

4 As to the caveator see PARA 86 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(5) (as amended: see note 3 supra).

6 Ibid r 49.

7 Ibid r 44(5) (as amended: see note 3 supra).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/88. Appearance by caveator.

88. Appearance by caveator.

A caveator¹ who has an interest contrary to that of the person warning², within eight days of service of the warning on him, inclusive of the day of service, or at any time after that if no affidavit of service has been filed³, may enter an appearance in the nominated registry⁴ by filing the prescribed form of appearance⁵, and must forthwith serve⁶ on the person warning a copy of the form of appearance sealed with the seal of the court⁷. A caveator who has no contrary interest to that of the person warning but who wishes to show cause against the sealing of a grant⁸ to that person may, within the same period, issue and serve a summons for directions⁹. If the caveator finds he has a common interest with the applicant for a grant, he may support the latter's application¹⁰. On the hearing of the summons for directions, the district judge¹¹ or registrar¹² may give a direction for the caveat to cease to have effect¹³. Upon being advised by the court concerned of the commencement of a probate action the senior district judge¹⁴ must give notice of the action to the caveator of every caveat then in force, other than a caveat entered by the plaintiff in the action¹⁵, and in respect of any caveat entered subsequent to the commencement of the action, he must give notice to that caveator of the existence of the action¹⁶.

1 As to entry of caveats see PARA 86 ante.

2 As to warnings see PARA 87 ante.

3 Ie under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(12) (as amended) (see PARA 89 post): see r 44(10) (as amended: see note 7 infra).

4 For the meaning of 'nominated registry' see PARA 87 note 2 ante.

5 The appearance must set out the caveator's interest, state the date of the will, if any, under which the interest arises and contain an address for service in England and Wales: see the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 44(10), 49, Sch 1 Form 5 (r 44(10) as amended (see note 7 infra); Sch 1 Form 5 amended by SI 1998/1903).

6 As to service see PARA 100 post.

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(10) (amended by SI 1991/1876; and SI 1998/1903).

8 For the meaning of 'grant' see PARA 27 note 7 ante.

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(6). The issue of a summons must be notified forthwith to the nominated registry: r 44(9) (amended by SI 1998/1903).

10 *Ingram v Strong* (1815) 2 Phillim 294 at 315.

11 For the meaning of 'district judge' see PARA 27 note 6 ante.

12 For the meaning of 'registrar' see PARA 27 note 7 ante.

13 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(7) (amended by SI 1991/1876).

14 For the meaning of 'senior district judge' see PARA 87 note 2 ante.

15 Non-Contentious Probate Rules 1987, SI 1987/2024, r 45(1) (amended by SI 1991/1876).

16 Non-Contentious Probate Rules 1987, SI 1987/2024, 45(2) (amended by SI 1991/1876). It is an abuse of the caveat procedure to enter a caveat where no probate issue arises. For instance, a caveat should not be entered on behalf of a defendant under the family provision legislation where the invalidity of the will is not in issue. As to family provision see PARA 665 et seq post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/89. Non-appearance of caveator.

89. Non-appearance of caveator.

A caveator who has not entered an appearance to a warning¹ may at any time withdraw his caveat by giving notice at the registry² or sub-registry at which it was entered, and the caveat then ceases to have effect³. If it has been withdrawn, the caveator must forthwith give notice of withdrawal to the person warning⁴. If no appearance has been entered by the caveator or no summons has been issued by him⁵, the person warning may at any time after eight days of service of the warning on the caveator, inclusive of the day of service, file in the nominated registry⁶ an affidavit showing that the warning was duly served and the caveat then ceases to have effect provided there is no pending summons⁷.

1 As to appearance to a warning see PARA 88 ante.

2 For the meaning of 'registry' see PARA 76 note 2 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(11).

4 Ibid r 44(11). As to warnings see PARA 87 ante.

5 Ie under ibid r 44(6) (see PARA 88 ante): see r 44(12) (as amended: see note 7 infra).

6 For the meaning of 'nominated registry' see PARA 87 note 2 ante.

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(12) (amended by SI 1998/1903). A pending summons is made under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(6) (see PARA 88 ante): see r 44(12) (as so amended).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/90. Subsequent proceedings.

90. Subsequent proceedings.

Unless a district judge¹ or registrar² otherwise directs³, any caveat in force when a summons for directions is issued remains in force unless withdrawn⁴ until the summons has been disposed of⁵. Unless a district judge or, where application to discontinue a caveat is made by consent, a registrar by order made on summons otherwise directs, any caveat in respect of which an appearance to a warning has been entered⁶ remains in force until the commencement of a probate action⁷. Unless a district judge by order made on summons otherwise directs, the commencement of a probate action operates to prevent the sealing of a grant⁸ (other than a grant to an administrator pending suit⁹) until application for a grant is made by the person shown by the court's decision to be entitled to the grant¹⁰. If, after appearance, the parties come to terms, a summons on an application to discontinue proceedings may then be taken out, and, on the requisite order being made, the grant will issue in due course¹¹.

Where a caveat is in force or has ceased to have effect¹² the caveator may not enter further caveats without the leave of a district judge¹³.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 Ie under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(7) (as amended) (see PARA 88 ante); see r 44(8) (as amended: see note 5 infra).

4 Ie under ibid r 44(11) (see PARA 89 ante); see r 44(8) (as amended: see note 5 infra).

5 Ibid r 44(8) (amended by SI 1991/1876).

6 See PARA 88 ante.

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(13) (amended by SI 1991/1876). Neither the caveat nor the entry of an appearance to the warning amounts to the institution of proceedings in an action: cf CPR Pt 49; *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A paras 1, 2. See also PARA 277 post. As to warnings see PARA 87 ante. As to the CPR see PARA 37 note 3 ante. It is not until a claim form has been issued that there is litigation between the parties: see *Moran v Place* [1896] P 214, CA; *Salter v Salter* [1896] P 291, CA. As to security for costs see PARA 334 post.

8 For the meaning of 'grant' see PARA 27 note 7 ante.

9 Ie a grant under the Supreme Court Act 1981 s 117 (see PARA 216 et seq post): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 45(3) (as amended: see note 10 infra).

10 Ibid r 45(3) (amended by SI 1991/1876). Upon such an application for a grant any caveat entered by the plaintiff in the action or in respect of which notice of the action has been given ceases to have effect: Non-Contentious Probate Rules 1987, SI 1987/2024, r 45(4).

11 See ibid r 44(13) (as amended). See also Tristram and Coote's Probate Practice (28th Edn) 541.

12 Ie under the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 44(7) (as amended), (12) (as amended), 45(4), 46(3) (as amended) (see PARAS 88-89 ante, 91 post): see r 44(14) (as amended: see note 13 infra).

13 Ibid r 44(14) (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

90 Subsequent proceedings

NOTE 7--*Practice Direction--Contentious Probate Proceedings* (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR Pt 57 (added by SI 2001/1388); and *Practice Direction--Probate* (2001) PD 57.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/91. Citations.

91. Citations.

A citation¹ is an instrument issuing from, and under the seal of, the principal registry of the Family Division or a district probate registry containing a recital of the reason for its issue and the interest of the party extracting it, and calling upon the party cited to enter an appearance and take the steps specified in it, with an intimation of the nature of the order the court is asked to and may make, unless good cause is shown to the contrary².

A citation is employed only in non-contentious matters³: its chief object is to compel all persons having a prior⁴ right to a grant to come in and take the grant, or, in default, that administration may be granted to the citor. A citation must be directed to all such persons so that each one has an opportunity to apply for a grant.

Any citation may issue⁵ from the principal registry of the Family Division or a district probate registry after the entry of a caveat⁶ and is settled by the district judge or registrar⁷ before being issued⁸. Every averment in a citation, and such other information as the registrar may require, must be verified by an affidavit sworn by the person issuing the citation (the 'citor'), provided that the district judge or registrar may in special circumstances accept an affidavit sworn by the citor's solicitor or probate practitioner⁹. Every will referred to in a citation must be lodged in a registry before the citation is issued, except where the will is not in the citor's possession and the district judge or registrar is satisfied that it is impracticable to require it to be lodged¹⁰.

¹ All citations in non-contentious business must contain an address for service within England and Wales: Non-Contentious Probate Rules 1987, SI 1987/2024, r 49.

² See Tristram and Coote's Probate Practice (28th Edn) 544.

3 Citations in contentious business have been abolished. As to the present contentious practice where citations would formerly have been used see PARA 286 post. As to the distinction between non-contentious and contentious business see PARA 80 ante.

4 *Re Harper* [1899] P 59.

5 Application for the issue of a citation may be made by post: *Practice Direction* [1969] 3 All ER 192, [1969] 1 WLR 1283.

6 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(3) (amended by SI 1991/1876). The citor must enter a caveat (see PARA 86 ante) before issuing a citation and, unless a district judge by order made on summons otherwise directs, any caveat in force at the commencement of the citation proceedings, unless withdrawn pursuant to r 44(11) (see PARA 89 ante), remains in force until application for a grant is made by the person shown to be entitled to one by the decision of the court in such proceedings, and upon such application any caveat entered by a party who had notice of the proceedings ceases to have effect: r 46(3) (as so amended). For the meaning of 'district judge' see PARA 27 note 6 ante. For the meaning of 'grant' see PARA 27 note 7 ante.

7 For the meaning of 'registrar' see PARA 27 note 7 ante.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(1) (amended by SI 1991/1876). The fee for perusing and settling a citation is £10: Non-Contentious Probate Fees Order 1999, SI 1999/688, art 3, Sch 1 Fee 11.

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(2) (amended by SI 1991/1876; and SI 1998/1903). Cf *Re Hutley* (1869) LR 1 P & D 596. For the meaning of 'probate practitioner' see PARA 84 note 4 ante.

10 Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(5) (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

91 Citations

NOTE 8--SI 1999/688 revoked: SI 2004/3123. SI 1999/688 art 3, Sch 1 Fee 11 now the Non-Contentious Probate Fees Order 2004, SI 2004/3120, art 2, Sch 1 Fee 11.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/92. Service of citation.

92. Service of citation.

Every citation must be served personally on the person cited unless on cause shown by affidavit, the district judge¹ or registrar² directs some other mode of service, which may include notice by advertisement³.

Service on a minor should be effected in the presence of one of his parents or guardians, or of the person with whom he resides or in whose care he is⁴. The minor's next of kin should also be served. Where the person cited is a person who by reason of mental disorder is incapable of managing and administering his property and affairs⁵ the citation must be served on the person, if any, authorised⁶ to conduct in his name or on his behalf the proceedings in connection with which the citation is to be served or, if there is no person so authorised, on the person with whom he resides or in whose care he is⁷.

A certificate of service should be indorsed on the citation⁸.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(4) (amended by SI 1991/1876).

4 *Cooper v Green* (1825) 2 Add 454; *Brown v Wildman* (1859) 28 LJP & M 54. See also RSC Ord 80 r 16. As to the application of the RSC to non-contentious probate matters see PARA 83 note 24 ante. Where both the custodian and the next of kin evaded service, service on the minor was held sufficient: *Lean v Viner* (1864) 3 Sw & Tr 469. See also *Lainson v Naylor* (1862) 2 Sw & Tr 7.

5 Ie within the meaning of the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 402); see RSC Ord 80 r 1.

6 Ie under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 681 et seq); see RSC Ord 80 r 16(2)(b).

7 See RSC Ord 80 r 16(1), (2)(b). The judge acting under the Mental Health Act 1983 Pt VII (as amended) may give directions as to the conduct of legal proceedings in the name of the patient or on his behalf: see s 96(1)(i); and MENTAL HEALTH vol 30(2) (Reissue) PARA 683. See also Heywood and Massey's Court of Protection Practice (12th Edn) 255-279.

8 *Goodburn v Bainbridge* (1860) 2 Sw & Tr 4; cf *Johnson v Weldy* (1861) 2 Sw & Tr 313 (affidavit of service should show how guardian became guardian).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

93. Appearance by person cited.

A person who has been cited to appear may enter an appearance¹ within eight days of the service of the citation upon him, inclusive of the day of service, or at any time after then if no application for certain orders² has been made by the citor³.

1 Appearance is effected in the registry from which the citation issued by filing the prescribed form containing inter alia the name, address and interest of the person cited, the date of the will, if any, under which the interest arises and an address for service within England and Wales, and the person appearing must forthwith serve on the citor a copy of the form of appearance sealed with the seal of the registry: see the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 46(6), 49. For the prescribed form of appearance see r 46(6), Sch 1 Form 5. For the meaning of 'registry' see PARA 76 note 2 ante. For the meaning of 'citor' see PARA 91 text to note 10 ante.

2 ie orders under ibid rr 47(5), 48(2) (both as amended) (see PARAS 94-96 post): see r 46(6).

3 Ibid r 46(6).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/94. Citations to accept or refuse a grant.

94. Citations to accept or refuse a grant.

A citation to accept or refuse a grant¹ may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right². The person cited is compelled by this to accept or refuse a grant. He can accept after entering an appearance by application ex parte by affidavit to a district judge³ or registrar⁴ for an order for a grant to himself⁵. If the person cited has entered an appearance to the citation but has not applied for a grant or has failed to prosecute his application with reasonable diligence the citor⁶ may apply by summons to a district judge or registrar for an order for a grant to himself⁷. If the time limited for appearance⁸ has expired and the person cited has not entered an appearance, the citor may apply to a district judge or registrar for an order for a grant to himself⁹.

Where power to make a grant to an executor has been reserved, a citation calling on him to accept or refuse a grant may be issued at the instance of the executors who have proved the will or the survivor of them or of the executors of the last survivor of deceased executors who

have proved¹⁰. He may then accept by application in the manner described above¹¹. If the time limited for appearance¹² has expired and the person cited has not entered an appearance, the citor may apply to a district judge or registrar for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased¹³. If the person cited has entered an appearance but has not applied for a grant or has failed to prosecute his application with reasonable diligence the citor may apply by summons to a district judge or registrar for an order striking out the appearance and for the indorsement on the grant of a similar note¹⁴.

1 For the meaning of 'grant' see PARA 27 note 7 ante. As to citations generally see PARA 91 ante.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(1).

3 For the meaning of 'district judge' see PARA 27 note 6 ante.

4 For the meaning of 'registrar' see PARA 27 note 7 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(4) (amended by SI 1991/1876). As to appearance by the person cited see PARA 93 ante.

6 For the meaning of 'citor' see PARA 91 text to note 10 ante.

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(7)(a) (amended by SI 1991/1876). The summons must be served on the person cited: Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(7). As to service see PARA 100 post.

8 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(6); and PARA 93 ante.

9 Ibid r 47(5)(a) (amended by SI 1991/1876). No summons is necessary in this case (see PARA 99 post), but the application must be supported by an affidavit showing that the citation was duly served (Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(6)).

10 Ibid r 47(2).

11 Ie under ibid r 47(4) (as amended): see the text to note 5 supra.

12 See note 8 supra.

13 Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(5)(b) (amended by SI 1991/1876). No summons is necessary in this case (see PARA 99 post), but the application must be supported by an affidavit showing that the citation was duly served (Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(6)). As to the cessation of the executor's rights see PARA 85 ante.

14 Ibid r 47(7)(b) (amended by SI 1991/1876). The summons must be served on the person cited: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(7); and PARA 100 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/95. Citation of executor de son tort.

95. Citation of executor de son tort.

A citation calling on an executor who has intermeddled in the estate of the deceased to show cause why he should not be ordered to take a grant¹ may be issued at the instance of any person interested in the estate at any time after the expiration of six months from the death of the deceased, provided that no citation to take a grant may issue while proceedings as to the validity of the will are pending². The person cited, if he is willing to take a grant, may after entering an appearance apply ex parte by affidavit to a district judge³ or registrar⁴ for an order for a grant to himself⁵. If the time limited for appearance has expired⁶ and the person cited has not entered an appearance, or after appearance has made no application for a grant⁷ or has failed to prosecute his application with reasonable diligence, the citor may apply to a district judge or registrar by summons, which must be served on the person cited, for an order requiring him to take a grant within a specified time, or for a grant to himself or some other person specified in the summons⁸.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(3). As to the executor de son tort see PARA 53 et seq ante.

3 For the meaning of 'district judge' see PARA 27 note 6 ante.

4 For the meaning of 'registrar' see PARA 27 note 7 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(4) (amended by SI 1991/1876).

6 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(6); and PARA 93 ante.

7 Ie under ibid r 47(4) (as amended): see r 47(7).

8 Ibid r 47(5)(c), (7)(c) (amended by SI 1991/1876). In the case of non-appearance the application must be supported by an affidavit showing that the citation was duly served: Non-Contentious Probate Rules 1987, SI 1987/2024, r 47(6).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/96. Citation to propound a will.

96. Citation to propound a will.

A citation to propound a will may be issued at the instance of any person who has an interest contrary to that of the executors or the persons interested under a will¹. It must be directed to the executors named in the will and to all the persons interested under it², and it compels the executors or the persons interested to propound the will. If the time limited for appearance has expired³ and no person has entered an appearance, the citor⁴ may apply to a district judge⁵ or registrar⁶ for an order for a grant⁷ as if the will were invalid⁸. If the time limited for appearance has expired in the case where no person who has entered an appearance proceeds with reasonable diligence to propound the will, the citor may apply to a district judge or registrar by summons, which must be served on every person cited who has entered an appearance, for an order for a grant as if the will were invalid⁹.

1 Non-Contentious Probate Rules 1987, SI 1987/2024, r 48(1). Rule 48 (as amended), applies only where the will has never been propounded at all: see *Re Jolley, Jolley v Jarvis* [1964] P 262, [1964] 1 All ER 596, CA. As to the procedure where a will has been proved in common form and it is desired to compel proof in solemn form see PARA 272 post.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 48(1).

3 See *ibid* r 46(6); and PARA 93 ante.

4 For the meaning of 'citor' see PARA 91 text to note 10 ante.

5 For the meaning of 'district judge' see PARA 27 note 6 ante.

6 For the meaning of 'registrar' see PARA 27 note 7 ante.

7 For the meaning of 'grant' see PARA 27 note 7 ante.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 48(2)(a) (amended by SI 1991/1876). Such application must be supported by an affidavit showing that the citation was duly served: Non-Contentious Probate Rules 1987, SI 1987/2024, r 48(2)(a) (as so amended).

9 *Ibid* r 48(2)(b) (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/97. Summonses.

97. Summonses.

In non-contentious matters a district judge¹ or registrar² may require any application to be made by summons to a district judge or registrar in chambers or a judge in chambers or open court³. An application for an inventory and account must be made by summons to a district judge or registrar⁴. A summons for hearing by a district judge or registrar must be issued out of the registry⁵ in which it is to be heard⁶. A summons to be heard by a judge must be issued out of the principal registry⁷.

1 As to the distinction between non-contentious and contentious business see PARA 80 ante. For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 61(1) (r 61(1)-(3) amended by SI 1991/1876).

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 61(2) (as amended: see note 3 supra). As to the duty of a personal representative to exhibit an inventory and account see PARA 375 post.

5 For the meaning of 'registry' see PARA 76 note 2 ante.

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 61(3) (as amended: see note 3 supra).

7 Ibid r 61(4).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/98. Procedure by summons.

98. Procedure by summons.

Applications on summons are made to the district judge¹ or registrar² in the following non-contentious matters³, among others:

- (1) where there is a dispute between two or more persons entitled in the same degree as to who is to take a grant⁴;
- (2) an application for an inventory and account⁵;
- (3) for an order that an intermeddling executor take a grant of probate⁶;
- (4) for an order after a citation to accept or refuse a grant or to propound a will when the party cited has entered an appearance but taken no further step⁷;
- (5) for directions where a caveator who has no interest contrary to that of the person warning wishes to show cause against the sealing of a grant to that person⁸; and
- (6) for an order requiring a person to attend for examination⁹.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 As to the distinction between non-contentious and contentious business see PARA 80 ante.

4 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(6) (as amended); and PARA 166 note 8 post. For the meaning of 'grant' see PARA 27 note 7 ante.

5 See *ibid* r 61(2) (as amended); and PARA 97 ante. As to the duty of a personal representative to exhibit an inventory and account see PARA 375 post.

6 See *ibid* r 47(5)(c), (7)(c) (as amended); and PARA 95 ante.

7 See *ibid* rr 47(7)(b), 48(2)(b) (both as amended); and PARAS 94, 96 ante.

8 See *ibid* r 44(6); and PARA 88 ante. As to caveats see PARA 86 ante.

9 See *ibid* r 50(1) (as amended); and PARA 76 note 3 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/99. Ex parte applications where no summons is required.

99. Ex parte applications where no summons is required.

Where it is necessary to obtain the directions or an order of a district judge¹ or registrar² in a non-contentious³ application for a grant⁴, and there is no provision that the matter be brought before him by summons, the application is made ex parte by lodging the necessary affidavits or

papers in the registry in which the matter is proceeding⁵. The most usual of such applications are:

- (1) for the appointment of a person to obtain administration for the use and benefit of a minor⁶;
- (2) for the amendment or revocation of grants⁷;
- (3) for a grant or order after a person cited to accept or refuse a grant or to propound a will has failed to enter an appearance⁸;
- (4) for the admission to proof of a nuncupative will or a copy or reconstruction of a will⁹;
- (5) for a grant limited to part of an estate¹⁰;
- (6) for a discretionary grant or a grant *ad colligenda bona*¹¹;
- (7) for leave to swear to death¹²;
- (8) for leave to withdraw a renunciation of probate or administration¹³; and
- (9) for a subpoena to bring in a will¹⁴.

An application to rectify a will may be made to a district judge or registrar unless a probate action has been commenced¹⁵.

- 1 For the meaning of 'district judge' see PARA 27 note 6 ante.
- 2 For the meaning of 'registrar' see PARA 27 note 7 ante.
- 3 As to the distinction between non-contentious business and contentious business see PARA 80 ante.
- 4 For the meaning of 'grant' see PARA 27 note 7 ante.
- 5 The district judge or registrar may require any application to be made by summons to a district judge or registrar in chambers or a judge in chambers or open court: see PARA 97 ante. As to applications to be made by summons see PARA 98 ante.
- 6 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(2) (as substituted); and PARA 203 post.
- 7 See *ibid* r 41 (as amended); and PARA 263 post.
- 8 See *ibid* rr 47(5)(a), 48(2)(a) (both as amended); and PARAS 94, 96 ante.
- 9 See *ibid* r 54 (as amended); and PARA 130 post. As to nuncupative wills see PARA 116 post.
- 10 See *ibid* r 51 (as amended); and PARA 227 post.
- 11 See *ibid* r 52 (as amended); and PARAS 180, 223 post.
- 12 See *ibid* r 53 (as amended); and PARA 144 post.
- 13 See *ibid* r 37(3) (as amended); and PARA 28 ante.
- 14 See *ibid* r 50(2) (as amended); and PARA 76 ante.
- 15 See *ibid* r 55(1) (as amended); and PARA 141 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/100. Service of summonses and notices.

100. Service of summonses and notices.

A judge of the High Court or district judge¹ or, where the application is to be made to a district probate registrar, that registrar², may direct that a summons is to be served on such person or persons as the judge, district judge or registrar may direct³.

Where a summons is required to be served on any person⁴, it must be served not less than two clear days before the day appointed for the hearing, unless a judge or district judge or registrar at or before the hearing dispenses with service on such terms, if any, as he may think fit⁵.

Unless a district judge or registrar otherwise directs or the non-contentious probate rules⁶ otherwise provide, any notice or other document required to be given to or served on any person may be given or served in the prescribed manner⁷.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 66(1) (amended by SI 1991/1876; and SI 1998/1903). This rule applies if no other provision for service is made by the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended): see r 66(1) (as so amended). If either side intends to appear by counsel the summons must be so marked and the other parties notified: *Practice Direction* [1953] 1 WLR 474.

4 Ie required by the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended) or by any direction given under r 66(1) (as amended): see r 66(2) (as amended: see note 5 infra).

5 Ibid r 66(2) (amended by SI 1991/1876).

6 Ie the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended): see r 67 (as amended: see note 7 infra).

7 Ibid r 67 (amended by SI 1991/1876). Service is prescribed by RSC Ord 65 r 5: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 67 (as so amended). As to the application of the RSC to non-contentious probate matters see PARA 83 note 24 ante. As to the distinction between non-contentious and contentious business see PARA 80 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/101. Non-contentious appeals.

101. Non-contentious appeals.

An appeal against a decision or requirement of a district judge¹ or registrar² is made by summons to a judge³.

Where a discretionary jurisdiction is given to the court, the judge is in no way fettered by the previous exercise of the district judge's or registrar's discretion. The judge is entitled to exercise his discretion as though the matter came before him for the first time⁴. An appeal lies to the Court of Appeal from an order made by a judge of the Family or Chancery Division in court⁵, whether the matter is contentious or non-contentious⁶.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 65(1) (r 65(1), (2) amended by SI 1991/1876). If, in an appeal, any person besides the appellant appeared or was represented before the district judge or registrar from whose decision or requirement the appeal is brought, the summons must be issued within seven days for hearing on the first available day and must be served on every such person: Non-Contentious Probate Rules 1987, SI 1987/2024, r 65(2) (as so amended). As to the time for service see PARA 100 ante.

4 *Cooper v Cooper* [1936] 2 All ER 542, CA; *Practice Note* [1949] WN 475, CA.

5 See the Supreme Court Act 1981 s 16; and COURTS.

6 *Re Clook* (1890) 15 PD 132, CA. As to the distinction between non-contentious business and contentious business see PARA 80 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

101 Non-contentious appeals

NOTE 3--SI 1987/2024 r 65(3) added: see SI 2003/185.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(1) THE HIGH COURT/(ii) Practice and Procedure/102. Evidence of foreign law.

102. Evidence of foreign law.

Where evidence as to the law of a country or territory outside England and Wales is required on any application for a grant¹, the district judge² or registrar³ may accept⁴ an affidavit from any person whom, having regard to the particulars of his knowledge or experience given in the affidavit, he regards as suitably qualified to give expert evidence of the law in question⁵ or a certificate by, or act before, a notary practising in the country or territory concerned⁶.

Where a will is shown by a properly authenticated copy issued by a notary practising out of England and Wales to have been executed in his presence or that of his predecessor, and recorded in his archives at the time of execution, it may be assumed for the purposes of an uncontested application to prove the will in this country, provided there are no unusual features, that the will is valid as to form by the internal law of the place where it was made⁷.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 For the meaning of 'district judge' see PARA 27 note 6 ante.

3 For the meaning of 'registrar' see PARA 27 note 7 ante.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 19 (amended by SI 1991/1876). As to proof of foreign law see generally CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 28-29; CIVIL PROCEDURE vol 11 (2009) PARA 1085 et seq.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 19(a).

6 Ibid r 19(b).

7 *Practice Direction* [1972] 3 All ER 1019, [1972] 1 WLR 1539. A will is to be treated as properly executed inter alia if its execution conformed with the internal law in force where it was executed: see the Wills Act 1963 s 1 (see WILLS vol 50 (2005 Reissue) PARA 310); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 451.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(i) Wills in England and Wales/103. Instruments of which probate may be granted.

(2) INSTRUMENTS ENTITLED TO PROBATE

(i) Wills in England and Wales

103. Instruments of which probate may be granted.

In general every instrument purporting to be testamentary¹, or to affect a previous testamentary instrument, and made by a person over the age of 18² and of full capacity³, and executed in accordance with the formal statutory requirements⁴, is entitled to probate if it purports to dispose⁵ of property⁶, whether or not the deceased in fact left any property⁷, or contains the appointment of an executor⁸ even if the executor renounces probate⁹. A writing which merely revokes a former testamentary disposition without making any disposition of its own ought not to be admitted to probate¹⁰, but the court may grant administration with the writing annexed¹¹. A will which merely appoints a guardian ought not to be admitted to probate¹².

1 The primary characteristics of a testamentary instrument are that it is designed to take effect after the testator's death and that it is of its own nature ambulatory and revocable during his life: see Jarman on Wills (8th Edn) 25-39. See also WILLS vol 50 (2005 Reissue) PARA 301. As to the form see note 4 infra; and PARA 104 post.

2 See the Wills Act 1837 s 7 (as amended); and PARA 307 post. See also WILLS vol 50 (2005 Reissue) PARA 323. As to the exemption from the age requirement in the case of wills of soldiers, sailors and airmen see PARA 113 et seq post.

3 See PARA 113 et seq post.

4 If it is to be valid in accordance with the internal law of England and Wales a will must normally be in writing, signed by the testator or by some other person in his presence and by his direction; it must appear that the testator intended by his signature to give effect to the will; the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and each witness must either attest and sign the will, or acknowledge his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation is necessary: Wills Act 1837 s 9 (substituted, in the case of deaths on or after 1 January 1983, by the Administration of Justice Act 1982 s 17). See also WILLS vol 50 (2005 Reissue) PARA 351 et seq.

A will may be treated as properly executed even though it does not conform to the requirements of the internal law of England and Wales if it complies with a system of law in accordance with which it may validly be executed by virtue of the Wills Act 1963: see PARA 112 post.

5 Probate of a document which has no dispositive effect will not normally be needed or granted: *Re Thomas, Public Trustee v Davies*[1939] 2 All ER 567 at 577. See, however, the cases cited in note 8 infra.

6 The property of which the instrument purports to dispose may be real or personal: see the Wills Act 1837 s 3 (as amended); and WILLS vol 50 (2005 Reissue) PARA 328.

7 See the Supreme Court Act 1981 s 25 which confers on the court all such jurisdiction in relation to probates as it had immediately before 1982: see PARA 73 note 4 ante. Before 1982 it had jurisdiction to grant probate notwithstanding that a testator left no estate: see the Administration of Justice Act 1932 s 2(1) (repealed). As to wills disposing solely of property abroad see PARA 122 post.

8 *Re Leese* (1862) 2 Sw & Tr 442; *Re Jordan*(1868) LR 1 P & D 555; *Re Irvine*[1919] 2 IR 485; *Re Hornbuckle* (1890) 15 PD 149.

9 *Re Jordan*(1868) LR 1 P & D 555.

10 *Re Fraser*(1869) LR 2 P & D 40. See also *Toomer v Sobinska*[1907] P 106; but cf *Re Durance*(1872) LR 2 P & D 406 (provisions of a testamentary nature).

11 *Re Hubbard*(1865) LR 1 P & D 53; *Re Hicks*(1869) LR 1 P & D 683. The present practice is to make a grant of administration without annexing the document. The grant bears a note that a duly attested instrument revoking former wills has been filed. See PARA 199 post.

12 *Re Morton* (1864) 3 Sw & Tr 422. See also *Gilliat v Gilliat and Hatfield* (1820) 3 Phillim 222.

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72-268 The Grant of Probate or Administration

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As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(i) Wills in England and Wales/104. Form of instrument immaterial.

104. Form of instrument immaterial.

The form of the instrument is immaterial. The only requirements are: (1) that it is intended by the testator to operate after his death; and (2) that it is executed in accordance with the statutory requirements¹. The principles to be applied to the first of these requisites differ from those to be applied on the interpretation of a will in a court of construction. In probate the whole question is one of intention: intention to make a will and intention to revoke a will are completely open to investigation²; but in a court of construction, once the validity of the will has been established, the inquiry is restricted to the contents of the instrument itself in order to ascertain the testator's intentions³. The intention that it should operate after death need not appear on the face of the instrument, but may be proved by extrinsic evidence⁴. Although on the face of it a document may be testamentary and duly executed, if it is proved that the deceased had no intention that it should operate as a will, it will not be admitted to probate⁵. Conversely, instruments in the form of deeds have been admitted to probate⁶.

1 *Habergham v Vincent* (1793) 2 Ves 204 at 231; *Masterman v Maberly* (1829) 2 Hag Ecc 235 at 248; *Cock v Cooke* (1866) LR 1 P & D 241; *Re Coles* (1871) LR 2 P & D 362; *Warwick v Warwick* (1918) 34 TLR 475, CA; *Governors and Guardians of Foundling Hospital v Crane* [1911] 2 KB 367, CA; *Godman v Godman* [1920] P 261, CA (where the cases are reviewed in the judgment of Scrutton LJ); *Re Berger* [1990] Ch 118 at 129, [1989] 1 All ER 591 at 599, CA, per Mustill LJ. See also WILLS vol 50 (2005 Reissue) PARA 351 et seq. As to the statutory requirements see PARA 103 note 4 ante.

2 *Methuen v Methuen* (1817) 2 Phillim 416 at 426; *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514 at 547, sub nom *Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1967] 3 All ER 915 at 925, PC.

3 *Greenough v Martin* (1824) 2 Add 239 at 243; *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514 at 547, sub nom *Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1967] 3 All ER 915 at 925, PC. As to the probate court's duty to construe a will only for the purpose of proving it see PARA 75 ante. Where the question of what instruments should be admitted to probate is a question of construction, it may be possible to have it determined by construction proceedings instead of by probate proceedings: *Re Finemore* [1992] 1 All ER 800, [1991] 1 WLR 793. The fact that a document has been admitted to probate does not prevent a court of construction from concluding that it has no operative effect: see PARA 66 ante.

4 *Robertson v Smith* (1870) LR 2 P & D 43; *Re Slinn* (1890) 15 PD 156.

5 *Nichols v Nichols* (1814) 2 Phillim 180; *Ferguson-Davie v Ferguson-Davie* (1890) 15 PD 109; cf *Selwood v Selwood* (1920) 125 LT 26 (soldier's letter not a testamentary paper). See *Corbett v Newey* [1998] Ch 57, [1996] 2 All ER 914, CA (conditionally executed will).

6 *Re Colyer* (1889) 14 PD 48; *Milnes v Foden* (1890) 15 PD 105.

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(i) Wills in England and Wales/105. Incorporation of documents.

105. Incorporation of documents.

In certain cases documents referred to in a testator's will or codicil, though not themselves duly executed, may be incorporated in the will and included in the probate¹. Such a document must be strictly identified with the description contained in the will²; but extrinsic evidence is admissible for the purpose of identification³. The reference must be to a document as an existing document⁴ and not to one which is to come into existence at a future date⁵. If the will can be construed as referring equally to an existing or future document, extrinsic evidence is not admissible⁶. The onus of proving the identity of the document and its existence at the date of the will lies upon the party seeking to establish it⁷, but the court will draw inferences from the circumstances surrounding the execution of the will⁸.

If a document of the kind referred to in the will comes into existence after the date of execution of the will but before the date of execution of a codicil confirming the will, the admissibility of the document to probate depends upon whether it is referred to in the will, treated as speaking at the date of the codicil, as an existing or future document. If the will *prima facie* refers to the document as an existing document, then, even though it appears from the surrounding circumstances, namely the date of the signing of the document, that it was not in existence at the date when the will was originally executed, the document may nevertheless be admitted to probate, since the will is treated as speaking from the date of its re-execution by the codicil⁹;

but if the will, treated as speaking at the date of the codicil, still in terms refers to a future document, the document cannot be admitted to probate even though it was in existence at the date of the codicil¹⁰.

1 *Re Mardon* [1944] P 109 at 112, [1944] 2 All ER 397 at 399. As to the incorporation in a will of the scale fees of a trust corporation see PARA 43 ante.

2 In such a case the registrar may call for evidence about the incorporation and may require the production of the document: see PARA 136 post. Where part of a document complies with the description contained in the will, and part does not, the part which complies may be admitted to probate: *Re Osburn* (1969) 113 Sol Jo 387, CA.

3 *Allen v Maddock* (1858) 11 Moo PCC 427; *Re Almosnino* (1859) 1 Sw & Tr 508; *Paton v Ormerod* [1892] P 247 at 252; *Re Garnett* [1894] P 90; *Eyre v Eyre* [1903] P 131; *Re Nicholls, Hunter v Nicholls* [1921] 2 Ch 11 (signature and attestation on outside of sealed envelope containing signed will).

4 *Re Mardon* [1944] P 109 at 112, [1944] 2 All ER 397 at 399; *Re Berger* [1990] Ch 118, [1989] 1 All ER 591, CA.

5 *Re Sunderland* (1866) LR 1 P & D 198; *Re Reid* (1868) 38 LJP & M 1; *Durham v Northen* [1895] P 66; *Re Smart* [1902] P 238. Certainty and identification is the very essence of incorporation: *Croker v Marquess of Hertford* (1844) 4 Moo PCC 339 at 366 per Dr Lushington. See also *Re Phillips, Boyle v Thompson* (1918) 34 TLR 256 (reference in will to letter afterwards found deposited in bank); *Re Jones* (1920) 123 LT 202; *Re Saxton, Barclays Bank Ltd v Treasury Solicitor* [1939] 2 All ER 418.

6 *University College of North Wales v Taylor* [1908] P 140, CA.

7 *Singleton v Tomlinson* (1878) 3 App Cas 404, HL.

8 *Re Saxton, Barclays Bank Ltd v Treasury Solicitor* [1939] 2 All ER 418.

9 *Re Lady Truro* (1866) LR 1 P & D 201 ('inventory signed by me and deposited herewith'). See also WILLS vol 50 (2005 Reissue) PARA 301.

10 *Re Smart* [1902] P 238 ('such friends as I may designate in a book or memorandum that will be found with this will'). The decisions in *Re Hunt* (1853) 2 Rob Eccl 622 and *Re Stewart* (1863) 3 Sw & Tr 192, where probate was granted of documents which were referred to as future documents in the will but which came into existence before the date of the codicil, were not based on any principle: see *Re Smart* supra at 241-242.

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106. Probate of codicils.

A codicil will be admitted to probate even where the will is not forthcoming¹ or has been revoked by destruction², notwithstanding that the codicil may have become unintelligible as a result³.

1 *Black v Jobling* (1869) LR 1 P & D 685 (commenting on *Clogstoun v Walcott* (1848) 5 Notes of Cases 623, and *Grimwood v Cozens* (1860) 2 Sw & Tr 364); *Gardiner v Courthope* (1886) 12 PD 14; *Re Savage* (1870) LR 2 P & D 78.

2 *Re Turner* (1872) LR 2 P & D 403. See, however, PARA 103 ante.

3 See WILLS vol 50 (2005 Reissue) PARA 392.

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107. Several testamentary instruments.

Where two testamentary documents are executed¹ on different dates, then, unless the later expressly or by implication revokes the earlier, both should be admitted to probate upon the principle that every document purporting to be testamentary and duly executed ought to be admitted to probate². Where the documents are executed simultaneously, or it cannot be ascertained which was executed first, both are to be admitted to probate if upon any reasonable construction they can be so read as to stand together, but if they cannot be so read, neither is to be admitted to probate³. For these purposes the probate court must act as a court of construction⁴. When a final will, not inconsistent with an earlier will, appoints a fresh executor, probate is granted of both instruments to both executors jointly⁵.

1 As to separate wills disposing of English property and of foreign property see PARA 123 post.

2 *Townsend v Moore* [1905] P 66 at 77, CA, per Vaughan Williams LJ; *Re Adams* (1911) 45 ILT 93 (two testamentary papers, the later in date being described as a codicil); *Re Pawle, Winter v Pawle* (1918) 34 TLR 437 (letter as soldier's will and ordinary will both admitted to probate); *Nixon v Prince* (1918) 34 TLR 444; *Deakin v Garvie* (1919) 36 TLR 122, CA.

3 *Phipps v Earl of Anglesey* (1751) 7 Bro Parl Cas 443 at 452, HL; *Townsend v Moore* [1905] P 66 at 77, 84, CA. The court struggles to reconcile dispositions which on the face often might at first sight appear to be

somewhat irreconcilable: *Townsend v Moore* supra at 84-85. As to how far inconsistencies between a later and an earlier instrument amount to a revocation of the earlier see WILLS vol 50 (2005 Reissue) PARA 387 et seq.

Where a testator made a will in favour of two persons and a few days later made further wills, each relating to different property, in favour of those person and it was shown that he had believed separate wills to be necessary to dispose of separate properties, the inference that he knew and approved of the contents of his wills was held not to apply to printed revocation clauses in the subsequent wills and the wills were admitted to probate without those clauses: *Re Phelan* [1972] Fam 33, [1971] 3 All ER 1256. See also *Re Crannis' Estate, Mansell v Crannis* (1978) 122 Sol Jo 489. As to the presumption of knowledge and approval see PARA 316 et seq post.

4 *Lemage v Goodban* (1865) LR 1 P & D 57; *Townsend v Moore* [1905] P 66, CA; *Re Hawksley's Settlement, Black v Tidy* [1934] Ch 384. See also PARA 75 ante.

5 *Re Morgan* (1867) LR 1 P & D 323; *Re Strahan* [1907] 2 IR 484.

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108. Joint wills.

Where two testators make their wills in one and the same instrument, the instrument constitutes a joint will¹. In practice the whole of a joint will is ordinarily proved on the death of the first of the testators to die² as the will of that testator; and it is proved again on the death of the survivor of the testators as his or her will³. Wills of two or more persons, for example of husband and wife, made by arrangements between them⁴ and conferring reciprocal benefits but contained in separate instruments, are sometimes referred to as joint wills but more usually as mutual wills⁵; so far as grants of probate or administration are concerned, mutual wills are not the subject of any special rule.

1 See WILLS vol 50 (2005 Reissue) PARA 307.

2 See Tristram and Coote's Probate Practice (28th Edn) 72-73. The practice, followed in *Re Piazza-Smyth* [1898] P 7, of proving on the first death only so much of the will as becomes operative on that death is not now followed.

3 See WILLS vol 50 (2005 Reissue) PARA 307.

4 See eg *Re Green, Lindner v Green* [1951] Ch 148, [1950] 2 All ER 913.

5 As to mutual wills generally see WILLS vol 50 (2005 Reissue) PARA 308.

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109. Duplicate will.

Where a will has been made in duplicate and there is a reference in the part produced for probate to execution in duplicate, both parts must be lodged at the registry for a grant, but one part is handed back with the grant after collation¹.

¹ See Tristram and Coote's Probate Practice (28th Edn) 71. As to the presumption of revocation arising from the destruction of one of the duplicates see WILLS vol 50 (2005 Reissue) PARA 394.

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72-268 The Grant of Probate or Administration

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(i) Wills in England and Wales/110. Probate of contents of lost will.

110. Probate of contents of lost will.

Where a testamentary instrument has been lost or destroyed in such a way as not to effect a revocation, probate may be granted¹ of its contents upon proof of those contents and of the due execution and attestation of the instrument².

A person who sets up an alleged will and is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation by evidence which is clear and satisfactory³. It seems that the standard of proof required is the ordinary standard of proof in civil cases, namely the establishment of a reasonable balance of probability⁴. If an intention on the part of the alleged testator to do some formal act is established, and the evidence is consistent with that intention having been carried into effect in a proper way, the court may infer the actual observance of all due formalities as a matter of probability⁵.

The contents of a lost will may be proved by the evidence of a single witness whose veracity and competency are unimpeached, even if he has an interest⁶. Where an alleged draft of the lost will is produced the court must take the evidence of witnesses side by side with the alleged draft and out of them extract the contents of the will as well as it can⁷.

1 As to the special procedure on an application for a grant in respect of nuncupative wills and copies see PARA 130 post. As to the offence of destroying a will see PARA 76 ante.

2 See the Wills Act 1837 s 20 (as amended) (intent to revoke necessary); and WILLS vol 50 (2005 Reissue) PARA 385. See also *Brown v Brown* (1858) 8 E & B 876; *Sugden v Lord St Leonards* (1876) 1 PD 154 at 238-240, CA, per Jessel MR. See further *Allan v Morrison* [1900] AC 604, PC; *Re Crandon* (1901) 84 LT 330; *Re Spain* (1915) 31 TLR 435 (testator, attesting witnesses, and will lost in explosion); *Re Phibbs* [1917] P 93; *Re Queen Marie of Roumania* (1950) 94 Sol Jo 673 (will as embodied in copy of Roumanian 'act de partage' admitted to probate); *Re Webb, Smith v Johnston* [1964] 2 All ER 91, [1964] 1 WLR 509 (will destroyed by enemy action while in solicitor's custody; attestation clause in a completed draft sufficient evidence of due execution). As to revocation of wills see WILLS vol 50 (2005 Reissue) PARA 379 et seq. As to the admissibility of declarations by a testator as evidence by virtue of the Civil Evidence Act 1995 s 1 see CIVIL PROCEDURE. As to evidence of execution in proceedings for probate in solemn form see PARA 303 et seq post.

3 *Harris v Knight* (1890) 15 PD 170 at 179, CA, per Lindley LJ; *Woodward v Goulstone* (1886) 11 App Cas 469 at 475, HL, per Lord Herschell LC; *Re MacGillivray* [1946] 2 All ER 301, CA.

4 *Wissler v Wipperman* [1955] P 59 at 65, [1953] 1 All ER 764 at 766; *Re Yelland, Broadbent v Francis* (1975) 119 Sol Jo 562. In these cases dicta in *Harris v Knight* (1890) 15 PD 170 at 179, CA, per Lindley LJ, and in *Woodward v Goulstone* (1886) 11 App Cas 469 at 475, HL, per Lord Herschell LC, that proof must be beyond reasonable doubt, were not followed.

5 *Harris v Knight* (1890) 15 PD 170, CA.

6 *Sugden v Lord St Leonards* (1876) 1 PD 154, CA; *Re Yelland, Broadbent v Francis* (1975) 119 Sol Jo 562.

7 *Burls v Burls* (1868) LR 1 P & D 472 at 474. The post-testamentary declaration of a testator as to the contents of his will have been admitted by the Court of Appeal (*Sugden v Lord St Leonards* (1876) 1 PD 154, CA, overruling *Quick v Quick and Quick* (1864) 3 Sw & Tr 442; *Gould v Lakes* (1880) 6 PD 1), but the question of their admissibility has been expressly left open by the House of Lords (*Woodward v Goulstone* (1886) 11 App Cas 469, HL). It was held in *Atkinson v Morris* [1897] P 40, CA, that declarations made by a testator after the date of an alleged will were not admissible to prove the execution of a will, following *Doe d Shallcross v Palmer* (1851) 16 QB 747 at 757; *Re Ripley* (1858) 1 Sw & Tr 68; and *Sugden v Lord St Leonards* supra. See also *Eyre v Eyre* [1903] P 131. Lord Russell of Killowen CJ, however, in *Atkinson v Morris* supra, admitted the rigour of a rule of evidence which shuts out 'evidence of great cogency and probative force', and it is conceivable that ex post facto declarations by a testator might be admitted as evidence of a testator's intention to have his will duly executed: see *Neal v Denston* (1932) 48 TLR 637; *Clarke v Clarke* (1879) 5 LR Ir 47, CA. Cf *Barkwell v Barkwell* [1928] P 91 at 97 per Lord Merrivale P. See also PARAS 304-305 post.

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72-268 The Grant of Probate or Administration

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As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

110 Probate of contents of lost will

NOTE 7--See also *Wren v Wren* [2006] EWHC 2243 (Ch), [2006] 3 FCR 18 (a lost will was produced which reflected the intentions of the deceased).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(i) Wills in England and Wales/111. Burnt, faded or torn wills.

111. Burnt, faded or torn wills.

If the whole or part of a will is destroyed or made illegible by accidental causes such as burning, fading of ink, gnawing by rats or decay of the paper its contents may be proved by parol testimony¹. Where a torn will is admitted to probate, missing words will not be read into the will by the court, but when proved may be contained in a paper attached to the will².

¹ See *Re Wright* (1910) 44 ILT 137; *Re Bentley* [1930] IR 445. As to the presumption of revocation arising from intentional destruction or damage see PARA 137 post; and WILLS vol 50 (2005 Reissue) PARA 398.

² *Gill v Gill* [1909] P 157; *Re Leigh* [1892] P 82.

UPDATE

72-268 The Grant of Probate or Administration

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As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(i) Wills in England and Wales/112. Conflict of laws.

112. Conflict of laws.

A will is to be treated as properly executed if it complies with any system of internal law¹ in accordance with which it may be validly executed by virtue of the Wills Act 1963².

1 Ie the internal law in force in the territory where the will was executed or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of these times, he was a national: see the Wills Act 1963 s 1; and WILLS vol 50 (2005 Reissue) PARA 260; CONFLICT OF LAWS vol 8(3) (Reissue) PARA 451. For special provisions as to wills executed on board vessels or aircraft, wills of immovables etc see s 2; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 451.

2 See *ibid* s 1; and WILLS vol 50 (2005 Reissue) PARA 310; CONFLICT OF LAWS vol 8(3) (Reissue) PARA 451.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(ii) Privileged Wills/113. Soldiers', sailors' and airmen's wills.

(ii) Privileged Wills

113. Soldiers', sailors' and airmen's wills.

The condition that a testamentary instrument cannot be admitted to probate unless it is executed in accordance with the statutory requirements¹ does not apply to a soldier² in actual military service or to a mariner³ or seaman being either at sea⁴ or so circumstanced that if he were a soldier he would be in actual military service⁵, nor does it apply in like circumstances to a member of the Royal Air Force, who is for this purpose deemed to be a soldier⁶. A person so privileged may make a will even though he is under 18 years of age⁷ and may so dispose of real as well as personal estate⁸.

1 See PARA 103 note 4 ante.

2 'Soldier' includes a civilian in actual military service: *Re Stanley*[1916] P 192.

3 'Mariner' includes by implication members of the Royal Marines: see the Wills (Soldiers and Sailors) Act 1918 s 2. However, it seems that a marine would also be within the definition of a soldier.

4 See the Wills Act 1837 s 11. See also WILLS vol 50 (2005 Reissue) PARAS 371-373. As to the meaning of 'mariner or seaman' see PARA 115 post.

5 See the Wills (Soldiers and Sailors) Act 1918 s 2.

6 See *ibid* s 5(2).

7 See *ibid* s 1 (amended by the Family Law Reform Act 1969 s 3(1)(b)). See also WILLS vol 50 (2005 Reissue) PARA 371. As to the power to dispose of the effects of, and pay sums due to, deceased members of the armed forces, subject to certain limits of value, without the necessity for a grant of probate or administration see PARA 188 post.

8 See the Wills (Soldiers and Sailors) Act 1918 s 3 (amended by the Family Law Reform Act 1969 s 3(1)(b)). As to the oath to lead to probate of a privileged will see PARA 128 post. As to the revocation of a privileged will by a person under age see the Family Law Reform Act 1969 s 3(3); and WILLS vol 50 (2005 Reissue) PARA 371.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(ii) Privileged Wills/114. Actual military service.

114. Actual military service.

The question whether at the time of making his will a person is privileged as being in 'actual military service'¹ depends on the facts of each case and the circumstances which existed at the time². The term is the equivalent of the Latin 'in expeditione'³ if this term is broadly interpreted⁴, but it does not import the civil law principle that such a will is valid only for twelve months after discharge⁵. The term implies 'active' service⁶ on the part of a person of either sex⁷ and of any rank⁸ who is concerned with operations in a war which is or has been in progress or is imminent⁹, whether in England and Wales or abroad¹⁰, and whether or not an element of danger exists¹¹. It may include a soldier on leave in England from an army of occupation nine years after the cessation of hostilities¹², but it does not include mere service in barracks at home in time of peace¹³, although it seems that it may include the performance of professional duties, similar to those which an individual has carried out in peacetime, under military authority in time of war¹⁴, and operations against terrorists, clandestine assassins and arsonists¹⁵.

1 See PARA 113 ante.

2 *Re Rippon* [1943] P 61 at 67, [1943] 1 All ER 676 at 681. See also WILLS vol 50 (2005 Reissue) PARA 371.

- 3 *Drummond v Parish* (1843) 3 Curt 522, where the history of the privilege is reviewed. See Justinian's Institutes, Lib II, XI (1-4); *Re Phipps* (1840) 2 Curt 368; *Re Limond, Limond v Cunliffe* [1915] 2 Ch 240; *Re Kitchen, Kitchen v Allman* (1919) 35 TLR 612. See also *Godman v Godman* [1920] P 261, CA; *Re Grey* [1922] P 140 (will made in military hospital 18 months after cessation of active service not admitted).
- 4 *Re Wingham, Andrews v Wingham* [1949] P 187 at 193, [1948] 2 All ER 908 at 911, CA, per Cohen LJ, but see at 195 and at 913 per Denning LJ.
- 5 *Re Booth, Booth v Booth* [1926] P 118 at 135.
- 6 *Re Gossage, Wood v Gossage* [1921] P 194, CA; *Re Wingham, Andrews v Wingham* [1949] P 187 at 191, [1948] 2 All ER 908 at 910, CA, per Bucknill LJ.
- 7 *Re Rowson* [1944] 2 All ER 36.
- 8 *Re Hayes* (1839) 2 Curt 338; *Re Donaldson* (1840) 2 Curt 386 (surgeon); *Re Cory* (1901) 84 LT 270 at 271 (member of irregular force); *May v May* [1902] P 103n (quartermaster and honorary lieutenant); *Re Stanley* [1916] P 192 (military nurse on leave from hospital ship).
- 9 *Re Wingham, Andrews v Wingham* [1949] P 187 at 192, [1948] 2 All ER 908 at 911, CA, per Bucknill LJ; and see *Re Rippon* [1943] P 61, [1943] 1 All ER 676.
- 10 *Re Spark* [1941] P 115, [1941] 2 All ER 782; *Re Rowson* [1944] 2 All ER 36.
- 11 *Gattward v Knee* [1902] P 99 at 102; *Re Wingham, Andrews v Wingham* [1949] P 187 at 191, [1948] 2 All ER 908 at 910-911, CA, per Bucknill LJ.
- 12 *Re Colman* [1958] 2 All ER 35, [1958] 1 WLR 457.
- 13 *Drummond v Parish* (1843) 3 Curt 522. See WILLS vol 50 (2005 Reissue) PARA 371.
- 14 See *Re Wingham, Andrews v Wingham* [1949] P 187 at 194, [1948] 2 All ER 908 at 912, CA, per Cohen LJ, and at 197 and 914 per Denning LJ, doubting the authority of *Re Gibson* [1941] P 118n, [1941] 2 All ER 91. See also WILLS vol 50 (2005 Reissue) PARA 371.
- 15 *Re Anderson* (1953) 75 WNNSW 334 (service in Malaya); *Re Jones* [1981] Fam 7, [1981] 1 All ER 1 (service in Northern Ireland).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(ii) Privileged Wills/115. Meaning of 'mariner or seaman'.

115. Meaning of 'mariner or seaman'.

'Mariner or seaman'¹ extends to officers of every rank², to merchant seamen³ and to marines⁴. The privilege extends to a person in maritime service (not necessarily at sea)⁵ including service on board a vessel permanently stationed in a harbour⁶, or on service in a river⁷.

1 See PARA 113 ante. The special requirements of the Navy and Marines (Wills) Acts 1865, 1930 and 1939 (all repealed) which formerly regulated the disposition by a naval seaman or marine of money or property in the charge of the Admiralty were abolished as from 14 August 1953 except where the death occurred or the will was made before that date: Navy and Marines (Wills) Act 1953 ss 1(1), (2), 2(2).

2 *Re Hayes* (1839) 2 Curt 338; *Re Saunders* (1865) LR 1 P & D 16; *Re Rae* (1891) 27 LR Ir 116. A woman typist in the liner *Lusitania*, sunk in the 1914-18 war, was included in this category: *Re Hale* [1915] 2 IR 362.

3 *Morrell v Morrell* (1827) 1 Hag Ecc 51; *Re Milligan* (1849) 2 Rob Eccl 108; *Re Parker* (1859) 2 Sw & Tr 375.

4 See PARA 113 note 3 ante.

5 He is in the sense that the testator, at the time of making the will, is in post as a ship's officer, or is a member of a particular ship's company serving in that ship, including a member on shore leave or long leave ashore, or is employed by shipowners and having been discharged from one ship is already under orders to join another: see *Re Rapley's Estate*, *Rapley v Rapley* [1983] 3 All ER 248 at 251, [1983] 1 WLR 1069 at 1073 (where the unattested will of a seaman who was on leave, having been discharged from one ship and not posted to another, was held not to be valid). *Re Anderson*, *Anderson v Downes* [1916] P 49 (member of ambulance brigade called up by Admiralty on 2 August when he became a naval rating, but remaining in barracks until 17 August, when he went to sea: purported will made on 3 August held not a seaman's will, as testator never went to sea until he joined his ship) would seem to be no longer law in view of the Wills (Soldiers and Sailors) Act 1918 s 2: see PARA 113 ante. See also *Re Lay* (1840) 2 Curt 375; *Re Hale* [1915] 2 IR 362; *Re Thomas* (1918) 34 TLR 626; cf *Barnard v Birch* [1919] 2 IR 404 (document written at the Holyhead home of a captain of Irish mail packet between voyages held not to be a sailor's will); *Re Newland* [1952] P 71, [1952] 1 All ER 841; *Re Wilson*, *Wilson v Coleclough* [1952] P 92, [1952] 1 All ER 852.

6 *Re M'Murdo* (1868) LR 1 P & D 540.

7 *Re Austen* (1853) 2 Rob Eccl 611; *Re Patterson* (1898) 79 LT 123. Cf *Re Barnes*, *Hodson v Barnes* (1926) 136 LT 380, where words written on an eggshell by a Manchester Ship Canal pilot were propounded as a will, and the question whether he could be considered a mariner at sea was considered but not decided.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(ii) Privileged Wills/116. Informal and nuncupative wills of soldiers, sailors and airmen.

116. Informal and nuncupative wills of soldiers, sailors and airmen.

Any form of words, whether written, or spoken by the testator in the presence of a credible witness, will suffice to constitute a soldier's, sailor's or airman's will¹, providing that it is a deliberate expression of his wishes² and is intended to have testamentary effect³. The testator need not be conscious that he is making his will⁴. When a will is made orally it is called nuncupative⁵. Evidence of statements made by the deceased after executing the will is admissible to prove its contents, but cogent evidence is necessary⁶.

1 As to the privilege attaching to such wills see PARA 113 ante.

2 *Drummond v Parish* (1843) 3 Curt 522; *Re Vernon* (1916) 33 TLR 11 (will and two letters admitted to probate); *Selwood v Selwood* (1920) 125 LT 26. Cf *Boughton-Knight v Wilson* (1915) 32 TLR 146.

3 *Re Donner* (1917) 34 TLR 138; *Re Beech, Beech v Public Trustee* [1923] P 46, CA; *Re MacGillivray* [1946] 2 All ER 301, CA; *Re Knibbs, Flay v Trueman* [1962] 2 All ER 829, [1962] 1 WLR 852.

4 *Re Stable, Dalrymple v Campbell* [1919] P 7; *Re Spicer, Spicer v Richardson* [1949] P 441, [1949] 2 All ER 659. As to the revocation of a soldier's, sailor's or airman's will see WILLS vol 50 (2005 Reissue) PARA 373.

5 For instances of such wills see *Morrell v Morrell* (1827) 1 Hag Ecc 51; *Re Scott* [1903] P 243; *Re Stable, Dalrymple v Campbell* [1919] P 7; *Re Spicer, Spicer v Richardson* [1949] P 441, [1949] 2 All ER 659.

6 *Re MacGillivray* [1946] 2 All ER 301, CA.

UPDATE

72-268 The Grant of Probate or Administration

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(ii) Privileged Wills/117. Proof of soldier's, sailor's or airman's will.

117. Proof of soldier's, sailor's or airman's will.

In order to prove a soldier's, sailor's or airman's will¹, an affidavit should be sworn showing that at the time of its making the testator was 'in actual military service' or at sea, as the case may be² and that he was domiciled in England or Wales³. The terms and validity of a privileged will must be established to the district judge's or registrar's satisfaction⁴. Where a testator died domiciled in England and Wales and it appears to the district judge or registrar that there is prima facie evidence that a written will is privileged⁵ it may be admitted to proof if he is satisfied that it was signed by the testator or, if unsigned, that it is in the testator's handwriting⁶. If it is signed with the testator's mark, an affidavit must show that he had knowledge of its contents⁷. If the document is unattested, affidavit evidence will be required to prove that the signature is that of the testator⁸, and alterations and interlineations by the

testator necessitate similar proof⁹. If the will is attested, evidence of alterations must follow the requirements of the Wills Act 1837¹⁰. If it is a nuncupative will¹¹, an application for an order admitting it to proof is governed by special procedure¹².

Where a soldier's will (for example a letter) contains matter in reference to military operations, to the inclusion of which in the probate the military authorities object, the court may grant probate only of the part of the letter which is of a testamentary character without including in the probate the rest of the letter¹³.

1 As to the privilege attaching to such wills see PARA 113 ante.

2 See PARAS 113-115 ante.

3 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 18 (as amended: see note 6 infra). As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

4 See *ibid* r 17(2) (amended by SI 1991/1876). Nothing in the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 12-15 (all as amended) (see PARAS 133-134 post) applies to a privileged will: see r 17(1). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

5 The one to which the Wills Act 1837 s 11 (as amended) (see PARA 113 ante) applies: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 18 (as amended: see note 6 infra).

6 *Ibid* r 18 (amended by SI 1991/1876).

7 *Re Hackett* (1859) 4 Sw & Tr 220; *Re Thorne* (1865) 4 Sw & Tr 36.

8 *Re Hackett* (1859) 4 Sw & Tr 220; *Re Neville* (1859) 4 Sw & Tr 218.

9 See *Re Tweedale* (1874) LR 3 P & D 204.

10 See the Wills Act 1837 s 21 (as amended); and PARA 135 post.

11 See PARA 116 ante.

12 See PARA 130 post.

13 *Re Heywood* [1916] P 47.

UPDATE

72-268 The Grant of Probate or Administration

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(iii) Foreigners' Wills

118. Wills of persons dying domiciled abroad.

As a general rule, where a person dies domiciled abroad¹, and it becomes necessary to prove his will in England, it will be admitted to proof if it is established that the testator was domiciled in the country in question, and that either the foreign court has adopted his will as a valid testament or that his will is valid by the law² of that country³ or if (in the case of deaths in or after 1964) its execution conformed to the internal law in force in the territory where the will was executed or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of these times, he was a national⁴.

Where the deceased dies domiciled outside England, probate of any valid will may be granted⁵: (1) if the will is in the English or Welsh language, to the executor named in it⁶; or (2) if the will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the will⁷, to that person⁸. Where the whole or substantially the whole of the estate in England and Wales of such a person consists of immovable property, a grant in respect of the whole estate may be made in accordance with the law which would have been applicable if the deceased had died domiciled in England and Wales⁹.

1 As to domicile generally see CONFLICTOFLAWS vol 8(3) (Reissue) PARA 35 et seq.

2 However, at common law a will of immovables must comply with the formal requirements as to execution of the lex situs: see CONFLICTOFLAWS vol 8(3) (Reissue) PARA 443. This means that, in the case of deaths before 1964, in order to pass immovables situate in England or Wales and be admitted to proof here, a will must have complied with the formal requirements of the Wills Act 1837 (see PARA 103 note 4 ante). As to evidence of foreign law see PARA 102 ante.

3 *Enohin v Wylie* (1862) 10 HL Cas 1; *Re Deshais, Re Countess De Vigny* (1865) 34 LJPM & A 58; *Re Earl* (1867) LR 1 P & D 450; *Miller v James* (1872) LR 3 P & D 4; *Ewing v Orr Ewing* (1885) 10 App Cas 453, HL; *Re Yahuda* [1956] P 388, [1956] 2 All ER 262 (will made by deceased relating to English property; subsequent wills relating to property in other countries and purporting to revoke all previous wills; probate of all wills granted by court of domicile; probate granted in England of authenticated copy of the will relating to English property).

4 Wills Act 1963 s 1.

5 Ie without any order under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(1) (as amended) (see PARA 252 post): r 30(3). As to the procedure for obtaining the grant see PARA 254 post.

6 Ibid r 30(3)(a)(i). No expression in a language other than English or Welsh purporting to mean 'executor' will be accepted as constituting by itself an executor: *Practice Direction* [1953] 2 All ER 1154 at 1156, [1953] 1 WLR 1237 at 1239. In a case to which the Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(3)(a) applies, rr 20 (as amended), 22, 25 (as amended) and 27 (as amended) also apply: see r 28(2).

7 See PARA 9 ante.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(3)(a)(ii).

9 Ibid r 30(3)(b).

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72-268 The Grant of Probate or Administration

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119. Consular officers.

In certain circumstances, where a foreigner resident abroad is named as executor of a will disposing of property in England or Wales or is otherwise a person to whom a grant of representation to the estate of a deceased person in England or Wales may be made, a grant of representation to the estate is to be made to a consular officer of the state of which the foreign resident is a national¹.

¹ See PARA 210 post. As to the power of a consular officer to give receipts for money or property see PARA 193 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(iii) Foreigners' Wills/120. Extent to which English grant follows foreign grant.

120. Extent to which English grant follows foreign grant.

Where probate or its equivalent¹ has been granted by the foreign court to a person whose powers under the will fall short of the powers of an executor according to English law, then unless that person is entitled as executor on one of the grounds previously stated², the English grant is not of probate, but of letters of administration³ with the will annexed⁴. The English court will not make a grant to one who by English law is personally disqualified from taking the grant,

for instance a minor⁵, notwithstanding that he would be entitled to a grant under the foreign law.

1 There is no equivalent in many foreign countries where the system derives from the civil law: see eg Cohn's Manual of German Law (2nd Edn) 153-159.

2 See PARA 118 ante.

3 As to the person entitled to the grant see PARA 252 post.

4 *Re Earl* (1867) LR 1 P & D 450, followed in *Re Humphries* [1934] P 78 (grant to administratrix appointed by foreign court in her capacity as such, without her being obliged to take a grant as next of kin). See *Re Cosnahan* (1866) LR 1 P & D 183; *Re Hill* (1870) LR 2 P & D 89 (grant de bonis non); *Re Briesemann* [1894] P 260; *Re Von Linden* [1896] P 148; *Re Levy (otherwise Benoist)* [1908] P 108 (limited foreign grant, general grant in England); *Re Grewe* (1922) 127 LT 371 (grant of letters of administration requiring security); and see *Practice Direction* [1953] 2 All ER 1154, [1953] 1 WLR 1237. As to the grant of letters of administration see PARA 155 et seq post.

5 See *Re Duchess D'Orleans* (1859) 1 Sw & Tr 253; *Re Meatyard* [1903] P 125 at 129. Cf *Re Countess Da Cunha* (1828) 1 Hag Ecc 237 (grant limited to receipt of dividends to which minor was entitled). As to the appointment of a minor as executor see PARA 16 ante.

UPDATE

72-268 The Grant of Probate or Administration

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(iii) Foreigners' Wills/121. Admission to proof of duly authenticated copy of will.

121. Admission to proof of duly authenticated copy of will.

Where a will is not available for proof because it has been retained in the custody of a foreign court¹ or official, a duly authenticated copy of the will may be admitted to proof without the necessity for the making of any order for the purpose². Since the English grant is in general terms, probate will not be given of extracts only of a foreign will dealing with the testator's assets in England or Wales³. A person entrusted with administration of the estate by the court of the testator's domicile need not clear off executors when applying for a grant⁴.

1 As to the admission to probate in England of a will which has been adopted by a foreign court see PARA 118 ante.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 54(2). As to the general necessity for an order for the admission of a copy of a will see PARA 130 post. As to proof of a copy until the original is proved where the

original is detained abroad otherwise than in the custody of a court or official see PARA 151 post. Where a translation of the original will has been admitted to probate in the foreign country, the English courts decree probate of a translation of such translation: *Re Rule* (1878) 4 PD 76. Cf *Re Lemme* [1892] P 89 (translation of will of British subject registered in French court; probate granted of certified copy of will until original will brought in); *Re Von Linden* [1896] P 148. See *Re Clarke* (1867) 36 LJP & M 72 (Russian probate). Where the testator's English will is lodged with a notary abroad, the notarially certified document lodged may contain a translation into the foreign language and a retranslation into English, in which case, unless the applicant objects, the registry will call for a photographic or duly verified copy of the original will; in any event the registry may require the retranslation to be checked with the original if it appears on the face of the document that the retranslation is or may be inaccurate: *Practice Direction* [1953] 2 All ER 1154 at 1157, [1953] 1 WLR 1237 at 1241.

3 *Re Baroness Von Faber* (1904) 20 TLR 640.

4 *Practice Direction* [1953] 2 All ER 1154, [1953] 1 WLR 1237. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(iv) Wills disposing of Property Abroad/122. Will solely of property abroad.

(iv) Wills disposing of Property Abroad

122. Will solely of property abroad.

The object of a grant is to enable the executor or administrator to administer property in England and Wales¹. If there is no such property a grant is normally refused², for there is no purpose in making it³, but the court has power to make a grant where there is no property within the jurisdiction⁴.

1 *Re Coode* (1867) LR 1 P & D 449; *Re Tamplin* [1894] P 39; *Re Murray* [1896] P 65. Cf *Stubbings v Clunies-Ross* (1911) 27 TLR 361, where probate was granted of a will disposing of property abroad, some of which, however, had been brought to England; *Re Von Brentano* [1911] P 172. See also note 4 infra.

2 *Re Tucker* (1864) 34 LJP & A 29; *Aldrich v A-G* [1968] P 281 at 295, [1968] 1 All ER 345 at 351.

3 *Re Thomas, Public Trustee v Davies* [1939] 2 All ER 567.

4 See the Supreme Court Act 1981 s 25(1) (see PARA 73 ante) which preserves the court's jurisdiction in relation to probates as it had immediately before 1982, and so by implication preserves the power conferred by the Administration of Justice Act 1932 s 2(1) (repealed) to make a grant of probate notwithstanding that the testator left no estate in the jurisdiction. Such a grant will only be made when necessary for some collateral

purpose, as for example to clothe the applicant with the character of personal representative with a view to legal proceedings abroad: see *Re Coode* (1867) LR 1 P & D 449, where an application for this purpose was refused on the ground that (before the Administration of Justice Act 1932) the court had no power to grant it; and cf *Re Wayland* [1951] 2 All ER 1041 at 1044 (grant made in respect of Belgian wills not disposing of any English property and of English will).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(2) INSTRUMENTS ENTITLED TO PROBATE/(iv) Wills disposing of Property Abroad/123. Separate wills of property in England and of property abroad.

123. Separate wills of property in England and of property abroad.

Where a testator has made two wills, one dealing with his property in England and Wales and the other with his property abroad, probate may be obtained of the former will on the filing of an attested copy of the latter will annexed to an affidavit verifying it¹. If the two wills are not independent, but the one incorporates the other, probate is granted of both wills as in fact constituting one will². Where it is the testator's intention to keep the different properties separate, probate issues of the English will alone³, and where a will is left dealing only with property abroad, the court will grant administration of the testator's property in England and Wales to those entitled on intestacy⁴.

1 *Re Astor* (1876) 1 PD 150; *Re Callaway* (1890) 15 PD 147; *Re De la Rue* (1890) 15 PD 185; *Re Seaman* [1891] P 253; *Re Fraser* [1891] P 285; *Re Murray* [1896] P 65; *Re Paul, Gilmer v Overman* (1907) 23 TLR 716; and see *Re Bolton* (1887) 12 PD 202 where, with the consent of the Belgian executor, probate was granted of both a Belgian and an English will to the English executor. As to limited probate of copies see PARA 151 post.

2 *Re Harris* (1870) LR 2 P & D 83; *Re Mercer* (1870) LR 2 P & D 91; *Re De la Saussaye* (1873) LR 3 P & D 42; *Re Lord Howden* (1874) 43 LJP 26; *Re Western* (1898) 78 LT 49; *Re Green* (1899) 79 LT 738; *Re Todd* [1926] P 173 (English and American wills interdependent as to residue both proved, but American will to be handed out to foreign executors, after certified copy made for retention in registry).

3 *Re Schenley* (1903) 20 TLR 127.

4 *Re Mann* [1891] P 293.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/124. Applications.

(3) PROBATE IN COMMON FORM

(i) How and by Whom Obtained

124. Applications.

Applications for probate or for letters of administration may be made at the principal registry of the Family Division¹ or any district probate registry² or sub-registry³.

1 Supreme Court Act 1981 s 105(a). As to the practice on obtaining representation where the deceased was a patient within the jurisdiction of the Court of Protection see Heywood and Massey's Court of Protection Practice (12th Edn) 65-68. As to cases in which money or effects may be disposed of without the necessity of obtaining a grant of representation see PARA 187 post.

2 Supreme Court Act 1981 s 105(b). As to the powers of district probate registrars see PARA 79 ante. As to fees see PARA 82 ante.

3 See PARAS 126-127 post. As to the establishment of sub-registries see PARA 79 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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by Whom Obtained/124A. Application for probate or letters of administration: false or misleading statements or documents.

124A. Application for probate or letters of administration: false or misleading statements or documents.

Provisions not yet in force.

If a person who applies for any grant of probate or letters of administration (1) makes a statement in his application, or supports his application with a document, which he knows to be false or misleading in a material particular; or (2) recklessly makes a statement in his application, or supports his application with a document, which is false or misleading in a material particular, he is guilty of an offence: Courts and Legal Services Act 1990 s 54(3). 'Letters of administration' includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes: s 54(5).

As to making an application for probate or for letters of administration see PARAS 124, 125-127.

Any person guilty of an offence under head (1) or (2) above is liable on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum, or to both: s 54(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/125. Executor's right to probate.

125. Executor's right to probate.

The only person entitled to a grant of probate is the executor¹, whether he is expressly appointed or merely by implication according to the tenor². The application for a grant may be made by the executor in person or through a solicitor or probate practitioner³. Where the Crown may be beneficially interested notice must be given to the Treasury Solicitor⁴.

¹ As to the persons entitled in default of the executor to administration with the will annexed and as to grants to attesting witnesses and their spouses see PARA 198 et seq post.

2 *Wankford v Wankford* (1704) 1 Salk 299 at 309; *Re Almosnino* (1859) 1 Sw & Tr 508; *Re Manly* (1862) 3 Sw & Tr 56; *Re Fraser* (1870) LR 2 P & D 183 at 186; *Re Drumm* [1931] NI 12. As to the executor according to the tenor of the will see PARA 9 ante.

3 See PARAS 126-127 post. As to grants to consular officers where the person entitled to a grant is a non-resident foreigner see PARA 210 post. For the meaning of 'probate practitioner' see PARA 84 note 4 ante.

4 See PARA 170 post. As to grants to the Treasury Solicitor see PARA 171 post. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/126. Applications for grants through solicitors or probate practitioners.

126. Applications for grants through solicitors or probate practitioners.

Application for a grant¹ through a solicitor or probate practitioner² may be made at any registry³ or sub-registry⁴. Every solicitor or probate practitioner through whom an application for a grant is made must give the address of his place of business within England and Wales⁵.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 For the meaning of 'probate practitioner' see PARA 84 note 4 ante. Such a person is a barrister or duly certified notary public: see the Solicitors Act 1974 s 23(2) (as substituted); and LEGAL PROFESSIONS vol 65 (2008) PARA 592. This provision is prospectively amended by the Courts and Legal Services Act 1990 s 54(1) as from a day to be appointed, to include the Public Trustee, the Official Solicitor, authorised banks, building societies and insurance companies: see LEGAL PROFESSIONS vol 65 (2008) PARA 592. At the date at which this volume states the law, no such day had been appointed. As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq. As to the Official Solicitor see COURTS.

3 For the meaning of 'registry' see PARA 76 note 2 ante.

4 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 4(1) (r 4 amended by SI 1998/1903).

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 4(2) (as amended: see note 4 supra). As to the inclusion of a solicitor's office reference see PARA 128 note 5 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/127. Personal applications.

127. Personal applications.

A personal applicant¹ may apply for a grant at any registry² or sub-registry³. A personal applicant may not apply through an agent, whether paid or unpaid and may not be attended by any person acting or appearing to act as his adviser⁴. No legal advice may be given to a personal applicant by an officer of a registry⁵. A personal applicant must: (1) produce a certificate of the death of the deceased or such other evidence of the death as the district judge⁶ or registrar⁷ may approve⁸; and (2) supply all information necessary to enable the papers leading to the grant to be prepared in the registry⁹. Unless the district judge or registrar otherwise directs, every oath¹⁰ or affidavit required on a personal application must be sworn or executed before an authorised officer¹¹ by all the deponents¹². After a will has been deposited in a registry by a personal applicant, it may not be delivered to the applicant or to any other person unless in special circumstances the district judge or registrar so directs¹³.

No personal application is to be proceeded with if: (a) it becomes necessary to bring the matter before the court by action or summons, unless a judge, district judge or registrar so permits¹⁴; (b) an application has already been made by a solicitor or probate practitioner on behalf of the applicant and has not been withdrawn¹⁵; or (c) the district judge or registrar so directs¹⁶.

1 'Personal applicant' means a person other than a trust corporation who seeks to obtain a grant without employing a solicitor or probate practitioner, and 'personal application' has a corresponding meaning: Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1) (definition amended by SI 1998/1903). For the meaning of 'trust corporation' see PARA 18 note 4 ante. For the meaning of 'grant' see PARA 27 note 7 ante. For the meaning of 'probate practitioner' see PARA 84 note 4 ante. See also PARA 126 ante.

2 For the meaning of 'registry' see PARA 76 note 2 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 5(1).

4 Ibid r 5(2). There is an exception on an application for the resealing of a Commonwealth or colonial grant under r 39 (as amended) (see PARA 249 post): see r 5(2).

5 Ibid r 5(8). Every such officer is responsible only for embodying in proper form the applicant's instructions for the grant: r 5(8).

6 For the meaning of 'district judge' see PARA 27 note 6 ante.

7 For the meaning of 'registrar' see PARA 27 note 7 ante.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 5(5) (amended by SI 1991/1876).

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 5(6). Where it is necessary for the applicant to produce an original deed or other instrument, it is the practice of the registry to examine the instrument to ensure that it has been properly executed and duly stamped under the Stamp Act 1891: see *Practice Note* [1978] 1 All ER 1046, [1978] 1 WLR 430.

10 As to oaths see PARA 128 post.

11 'Authorised officer' means any officer of a registry who is for the time being authorised by the President to administer any oath or to take any affidavit required for any purpose connected with his duties: Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1).

12 Ibid r 5(7) (amended by SI 1991/1876).

13 Non-Contentious Probate Rules 1987, SI 1987/2024, r 5(4) (amended by SI 1991/1876).

14 Non-Contentious Probate Rules 1987, SI 1987/2024, r 5(3)(a) (amended by SI 1998/1903).

15 Non-Contentious Probate Rules 1987, SI 1987/2024, r 5(3)(b) (amended by SI 1998/1903).

16 Non-Contentious Probate Rules 1987, SI 1987/2024, r 5(3)(c) (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/128. Executor's oath.

128. Executor's oath.

Every application for a grant¹ must be supported by an oath² by the applicant in the form applicable to the circumstances of the case, and by such other papers as the district judge³ or registrar⁴ may require⁵.

The executor's oath must state that the document of which probate is to be granted is the true and original last will of the deceased and must prove the marking of the will⁶, the number of codicils, if any, the name and dates of birth and death⁷, the age⁸, and last address of the deceased. In the case of names and addresses which appear in the will, any discrepancy between those there given and the true ones must be set out in the oath⁹. The oath must also state whether or not, to the best of the applicant's knowledge, information and belief, there was land vested in the deceased which was settled previously to his death and not by his will and which remained settled notwithstanding his death¹⁰. Unless a district judge or registrar otherwise directs, the oath must state where the deceased died domiciled¹¹. An oath supporting a grant of probate of a privileged will¹² must state the domicile of the deceased at the date of

the will and the circumstances on which reliance is placed as constituting the privilege¹³. The oath concludes with a statement of the total value of the estate¹⁴.

Where it is sought to describe the deceased in a grant by some name in addition to his true name, the applicant must depose to the true name of the deceased and specify some part of the estate which was held in the other name, or give any other reason for the inclusion of the other name in the grant¹⁵.

A district judge or registrar may not allow any grant to issue until all inquiries which he may see fit to make have been answered to his satisfaction¹⁶.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 'Oath' means the oath required by the Non-Contentious Probate Rules 1987, SI 1987/2024, r 8 (as amended) to be sworn by every applicant for a grant: r 2(1). There is an exception for an application for the resealing of a Commonwealth or colonial grant under r 39 (as amended) (see PARA 249 post): see r 8(1) (as amended: see note 5 infra). In certain circumstances the applicant may affirm instead of taking an oath: see CIVIL PROCEDURE vol 11 (2009) PARA 1023. As to the appropriate wording to describe the applicant's relationship to the deceased see *Practice Direction* [1988] 2 All ER 308, [1988] 1 WLR 610.

3 For the meaning of 'district judge' see PARA 27 note 6 ante.

4 For the meaning of 'registrar' see PARA 27 note 7 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 8(1) (amended by SI 1991/1876). As to applications by trust corporations see PARA 175 post. If a solicitor wishes his office reference to be stated at the foot of the grant following his name this reference should be given following his name at the head of the oath, eg 'Extracted by A B and Company (ref WB) [address]': see *Practice Direction* [1972] 1 All ER 1056, [1972] 1 WLR 401.

6 Every will in respect of which an application for a grant is made: (1) must be marked by the signatures of the applicant and the person before whom the oath is sworn; and (2) must be exhibited to any affidavit which may be required under the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended) as to the validity, terms, condition or date of execution of the will: r 10(1). However, the district judge or registrar may allow a facsimile copy of a will to be marked or exhibited in lieu of the original document: r 10(2) (amended by SI 1991/1876).

7 I.e. the name and dates of birth and death as recorded in the Register of Deaths (where the death is so recorded), and any name by which the deceased was known which differed from that recorded in the Register: *Practice Direction* [1999] 1 All ER 832. This information should also be included in a notice lodged for a standing search or caveat: see PARAS 84, 86 ante. As to registration of deaths see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 561 et seq.

8 In those cases in which the exact age is not known, the applicant must give the best estimate he can: *Practice Direction* [1981] 2 All ER 832, [1981] 1 WLR 1185.

9 For the requirements where power is to be reserved to executors see PARA 129 post; and for the appropriate form of oath in such a case see *Practice Direction* [1988] 1 All ER 192, [1988] 1 WLR 195. As to the contents of the oath see generally Tristram and Coote's Probate Practice (28th Edn) 129 et seq.

10 Non-Contentious Probate Rules 1987, SI 1987/2024, r 8(3). As to settled land grants see PARA 229 et seq post.

11 Ibid r 8(2) (amended by SI 1991/1876). Where a country has no uniform system of law, the statement of domicile should specify the state, province or other judicial division of the country: *Practice Direction* [1961] 1 All ER 465, [1961] 1 WLR 253. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

12 As to privileged wills see PARAS 113-117 ante.

13 *Practice Direction* [1945] WN 120. The statement may be included in a supplementary affidavit: *Practice Direction* supra. As to special provisions in respect of nuncupative wills see PARA 130 post. As to nuncupative wills see PARA 116 ante.

14 Where the grant does not extend to the whole estate, the amount stated will be the value of the property to be included in the grant: see *Practice Direction* [1981] 2 All ER 832, [1981] 1 WLR 1185.

15 Non-Contentious Probate Rules 1987, SI 1987/2024, r 9.

16 Ibid r 6(1) (amended by SI 1991/1876). For example, the district judge or registrar may require proof, in addition to the oath, of the identity of the testator or of the party applying for the grant. Such an affidavit is sometimes needed where the executor is wrongly or imperfectly described in the will: see PARA 138 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

128 Executor's oath

TEXT AND NOTES--A justice of the peace may administer an oath for the purposes of an application for a grant of probate or letters of administration. see Courts and Legal Services Act 1990 s 56; and PARA 128A.

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128A. Administration of oath etc by justice of the peace.

Every justice of the peace has the power to administer an oath or take an affidavit for the purposes of an application for a grant of probate or letters of administration made in any non-contentious or common form probate business; and must state in the jurat or attestation where and on what date the oath or affidavit is taken or made. see Courts and Legal Services Act 1990 s 56(1), (2), (5). 'Affidavit' has the same meaning as in the Commissioners for Oaths Act 1889 (see s 11; and CIVIL PROCEDURE vol 11 (2009) PARA 1026); Courts and Legal Services Act 1990 s 56(5). 'Letters of administration' includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes: s 56(5). 'Non-contentious or common form probate business' has the same meaning as in the Senior Courts Act 1981 s 128 (see PARA 74 NOTE 5); Courts and Legal Services Act 1990 s 56(5) (definition amended by Constitutional and Reform Act 2005 Sch 11 para 1(2) (not yet in force)).

No justice may exercise the powers above in any proceedings in which he is interested: Courts and Legal Services Act 1990 s 56(3). A document purporting to be signed by a justice administering an oath or taking an affidavit must be admitted in evidence without proof of the signature and without proof that he is a justice: s 56(4).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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129. Power reserved to non-proving executors.

Where on an application for probate, power to apply for a like grant is to be reserved to such other of the executors as have not renounced probate¹, notice of the application must be given to the executor or executors to whom power is to be reserved, and unless the district judge² or registrar³ otherwise directs, the oath⁴ must state that such notice has been given⁵. However, a district judge or registrar may dispense with the giving of notice if he is satisfied that the giving of such notice is impracticable or would result in unreasonable delay or expense⁶. Where power is to be reserved to executors who are partners in a firm, notice need not be given to them if probate is applied for by another partner in the firm⁷.

1 As to renunciation of the office of executor see PARA 26 et seq ante.

2 For the meaning of 'district judge' see PARA 27 note 6 ante.

3 For the meaning of 'registrar' see PARA 27 note 7 ante.

4 For the meaning of 'oath' see PARA 128 note 2 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(1) (substituted by SI 1991/1876), which is expressed to be subject to the Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(1A), (2), (3) (r 27(1A) as added and amended, r 27(3) as amended). Where power is to be reserved to partners of a firm, notice may be given to the partners by sending it to the firm at its principal or last known place of business: r 27(2). As to notices generally see PARA 100 ante.

6 Ibid r 27(3) (amended by SI 1991/1876).

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(1A) (added by SI 1991/1876, and amended by SI 1998/1903). See also *Practice Direction* [1990] 2 All ER 576, [1990] 1 WLR 1083, HL.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/130. Applications on nuncupative wills and copies.

130. Applications on nuncupative wills and copies.

An application for an order admitting to proof a nuncupative will¹ or a will contained in a copy, or reconstruction where the original will is not available², is made to a district judge³ or registrar⁴. Where all parties interested are of full age and capacity and consent, ex parte applications for probate in common form of such wills are normally heard by the district judge or registrar⁵. When the estate is small, the court may dispense with the consent of the parties interested in the estate⁶. Where there are minority interests or consent is not forthcoming, or there is no clear evidence that the will was in existence at the time of the testator's death, or of its contents, the application may be directed to be made on summons⁷, and, in the case of a will which has been lost or destroyed where there are minority interests or lack of consent, an action for proof in solemn form⁸ may be required⁹.

The application must be supported by an affidavit setting out the grounds of the application and by such evidence on affidavit as the applicant can adduce¹⁰ as to: (1) the will's existence after the testator's death, or where there is no such evidence, the facts on which the applicant relies to rebut the presumption that the will has been revoked by destruction¹¹; (2) in respect of a nuncupative will, the contents of that will¹²; and (3) in respect of a reconstruction of a will, the accuracy of that reconstruction¹³. The district judge or registrar may require additional evidence in the circumstances of a particular case as to due execution of the will or as to the accuracy of the copy will, and may direct that notice be given to persons who would be prejudiced by the application¹⁴.

If, in the absence of the original will, there is a true copy or draft of the will in existence, limited probate¹⁵ is granted of that copy or draft¹⁶; if the contents have to be proved by extrinsic evidence, probate is granted of a reconstruction of the contents of the will as nearly as possible in its original form¹⁷. Probate may also be granted of a press copy of a copy of the will¹⁸. Where the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved¹⁹. Probate will be decreed to issue of the copy, draft or the substance of the will until the original will or a more authentic copy of it is proved.

1 As to nuncupative wills see PARA 116 ante. As to the general practice in relation to privileged wills see PARAS 113 et seq, 128 ante.

2 Cf para 110 ante.

3 For the meaning of 'district judge' see PARA 27 note 6 ante.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 54(1) (amended by SI 1991/1876). For the meaning of 'registrar' see PARA 27 note 7 ante. In any case where a will is not available owing to its being retained in the custody of a foreign court or official, a duly authenticated copy may be admitted to proof without such an order: Non-Contentious Probate Rules 1987, SI 1987/2024, r 54(2). See also PARA 121 ante.

5 See *Re Nuttall* [1955] 2 All ER 921n, [1955] 1 WLR 847 (decided under the Non-Contentious Probate Rules 1954, SI 1954/786 (repealed)). If the district judge or registrar considers that the matter is one which should be dealt with by the court, he has power so to direct under what is now the Non-Contentious Probate Rules 1987, SI 1987/2024, r 61(1) (as amended) (see PARA 97 ante): see *Re Nuttall* supra.

6 *Re Apted* [1899] P 272, qualifying *Re Pearson* [1896] P 289. See also *Re Brassington* [1902] P 1.

7 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 61(1) (as amended); and PARA 97 ante.

8 See PARA 269 et seq post.

9 *Re Barber* (1866) LR 1 P & D 267; *Re Carter* (1908) 52 Sol Jo 600. The claim should allege that the will was never revoked or destroyed by the testator, nor by any person in his presence and by his direction, with the intention of revocation, and that it was valid and subsisting at the time of his death but cannot be found, and set out the substance of the contents: see *Sugden v Lord St Leonards* (1876) 1 PD 154 at 154-158, CA.

10 Non-Contentious Probate Rules 1987, SI 1987/2024, r 54(3).

11 Ibid r 54(3)(a).

12 Ibid r 54(3)(b).

13 Ibid r 54(3)(c).

14 Ibid r 54(4) (amended by SI 1991/1876).

15 As to grants limited in relation to time see PARA 151 post.

16 *Re Crofts* (1900) 17 TLR 16; *Re Crandon* (1901) 84 LT 330.

17 *Sugden v Lord St Leonards* (1876) 1 PD 154, CA.

18 *Lafone v Griffin* (1909) 25 TLR 308.

19 *Sugden v Lord St Leonards* (1876) 1 PD 154, CA.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/131. Inland revenue account.

131. Inland revenue account.

Except as otherwise provided¹, the personal representatives of the deceased must deliver to the Inland Revenue Commissioners an account specifying to the best of their knowledge and

belief all appropriate property for the purpose of inheritance tax and the value of that property².

In general, no grant³ may be made, and no grant made outside the United Kingdom⁴ may be resealed⁵, except on the production of an inheritance tax account⁶ showing by means of such receipt or certification as may be prescribed by the Inland Revenue Commissioners⁷ either that the inheritance tax payable on the delivery of the account has been paid⁸, or that no such tax is so payable⁹.

1 Ie except as provided by the Inheritance Tax Act 1984 s 216 (as amended) or by regulations under s 256: see s 216(1); and INHERITANCE TAXATION vol 24 (Reissue) PARA 655. Certain small estates are exempted from the requirement to deliver an account by the Capital Transfer Tax (Delivery of Accounts) Regulations 1981, SI 1981/880 (as amended): see INHERITANCE TAXATION vol 24 (Reissue) PARA 655. As to the statement to be included in the oath leading to a grant in respect of such an estate see *Practice Direction* [1981] 2 All ER 832, [1981] 1 WLR 1185.

2 See the Inheritance Tax Act 1984 s 216(1)(a); and INHERITANCE TAXATION vol 24 (Reissue) PARA 655. In general, where the account is to be delivered by personal representatives, the appropriate property is all property which formed part of the deceased's estate immediately before his death, but where the account is to be delivered by a person who is an executor of the deceased only in respect of settled land in England and Wales the appropriate property is any property to the value of which tax is or would be attributable: see s 216(3), (4) (s 216(3) as amended); and INHERITANCE TAXATION vol 24 (Reissue) PARA 655. In certain circumstances a provisional estimate of the value of the property may be delivered; and the Commissioners may from time to time give general or special directions for restricting the property to be specified by any class of personal representatives: see s 216(3)(a), (b); and INHERITANCE TAXATION vol 24 (Reissue) PARA 655. An account must be delivered before the expiration of the period of 12 months from the end of the month in which the death occurs or, if it expires later, the period of three months beginning with the date on which the personal representatives first act as such: see s 216(6)(a); and INHERITANCE TAXATION vol 24 (Reissue) PARA 655. For the penalty for failure to deliver an account see s 245(1)(a); and INHERITANCE TAXATION vol 24 (Reissue) PARA 708.

3 For the meaning of 'grant' see PARA 27 note 7 ante.

4 For the meaning of 'United Kingdom' see PARA 18 note 4 ante.

5 As to the resealing of grants see PARA 243 et seq post.

6 Ie prepared in pursuance of the Inheritance Tax Act 1984 (see INHERITANCE TAXATION vol 24 (Reissue) PARA 655): see the Supreme Court Act 1981 s 109(1) (as amended: see note 7 infra).

7 Ibid s 109(1) (s 109 amended by the Inheritance Tax Act 1984 ss 274, 276, Sch 8 para 20). At the date at which this volume states the law, the arrangements are for a Form P26A, prepared by the applicant for a grant and stating the gross and net estates and the amount of inheritance tax payable, to be indorsed once the tax has been paid and filed with the application for probate. The account is retained by the Inland Revenue Commissioners and not sent to the probate registry. Corresponding provisions requiring the certification on a grant of the delivery of the Inland Revenue affidavit in the case of persons dying before 13 March 1975 is made by the Customs and Inland Revenue Act 1881 s 30; Finance Act 1894 s 8(17) (both repealed as to deaths on or after that date). See also the Non-Contentious Probate Rules 1987, SI 1987/2024, r 42, Sch 1 Form 1. As to the form of accounts generally see INHERITANCE TAXATION vol 24 (Reissue) PARA 662.

8 Supreme Court Act 1981 s 109(1)(a).

9 Ibid s 109(1)(b). Arrangements may be made between the President of the Family Division and the Inland Revenue Commissioners providing for these purposes in such cases as may be specified in the arrangements that the receipt or certification of an account may be dispensed with or that some other document may be substituted for the account required by the Inheritance Tax Act 1984: Supreme Court Act 1981 s 109(2) (as amended: see note 7 supra). Nothing in s 109(1) (as amended) applies in relation to a case where the delivery of the account required by the Inheritance Tax Act 1984 Pt VIII (ss 215-261) (as amended) has for the time being been dispensed with by any regulations under s 256(1)(a) (see note 1 supra): Supreme Court Act 1981 s 109(3) (as amended: see note 7 supra).

As to bank loans for the payment of inheritance tax see PARA 29 note 4 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/132. Completing the record.

132. Completing the record.

Engrossment of the testamentary documents is not normally required on an application for a grant, though an engrossment must be lodged in certain cases¹. After the Inland Revenue account² has if necessary been submitted to and passed at the Capital Taxes Office³, all the documents, including the original will and codicils, if any, are left at, or sent to, the probate registry or sub-registry, and the form of grant is then filed up at the registry and the record completed⁴.

All original wills and other documents which are under the control of the High Court in the principal registry of the Family Division or any district probate registry must be deposited and preserved in such places as the Lord Chancellor⁵ directs, and such documents are open to inspection, subject to the control of the High Court and to probate rules⁶. An original will or other document will not be open to inspection if, in the opinion of a district judge or registrar, such inspection would be undesirable or otherwise inappropriate⁷. Copies of original wills and certificates of grants of administration may be obtained from probate registries⁸.

1 An engrossment suitable for facsimile reproduction may be required where the district judge or registrar considers that a facsimile copy of the original will would not be satisfactory in any particular case for purposes of record: Non-Contentious Probate Rules 1987, SI 1987/2024, r 11(1) (amended by SI 1991/1876). Where a will contains alterations which are not to be admitted to proof, or has been ordered to be rectified by virtue of the Administration of Justice Act 1982 s 20(1) (see WILLS vol 50 (2005 Reissue) PARA 408), an engrossment of the will in the form in which it is to be proved must be lodged: Non-Contentious Probate Rules 1987, SI 1987/2024, r 11(2). Any engrossment lodged must reproduce the punctuation, spacing and division into paragraphs of the will and follow continuously from page to page on both sides of the paper: r 11(3). As an alternative to typewritten engrossments, facsimile copies produced by photography may be used in certain circumstances: see *Practice Direction* [1979] 3 All ER 859.

2 An account in respect of inheritance tax must be delivered: see PARA 131 ante. Subject to any arrangements which may from time to time be made between the President of the Family Division and the Commissioners of Inland Revenue, the Principal Registry and every district probate registry must, within such period after a grant as the President may direct, deliver to the Commissioners or their proper officer the following documents: (1) in the case of a grant of probate or of administration with the will annexed, a copy of the will; and (2) in every case, such certificate or note of the grant as the Commissioners may require: Supreme Court Act 1981 s 110.

3 As to the Capital Taxes Office see INHERITANCE TAXATION vol 24 (Reissue) PARA 405.

4 Records must be kept of all grants of probate and administration, which are made at the principal registry of the Family Division or in any district probate registry: Supreme Court Act 1981 s 111(1). The records

must be in such form and contain such particulars as the President of the Family Division may direct: s 111(2). As from 9 November 1998, records of all such grants of representation must be maintained in the form of a computer record. Annual calendar books will continue to be prepared and will incorporate the information held on computer. The information must comprise: (1) the full name of the deceased and any alias names; (2) the last address of the deceased; (3) the date of death and domicile of the deceased; (4) the name(s) and address(es) of the executor(s) or administrator(s); (5) the type of grant; (6) the gross and net values of the estate or in the case of an excepted estate the limits within which the estate falls; (7) the name and address of the extracting solicitor (if any) or the fact that the grant was obtained by way of personal application; and (8) the date of the grant and the issuing registry: *Practice Direction* [1999] 1 All ER 384, [1998] 1 WLR 1699.

5 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

6 Supreme Court Act 1981 s 124. The court cannot sanction the taking out of the jurisdiction of an original will admitted to probate: *Re Greer* (1929) 45 TLR 362; cf *Re Guinee* (1929) 73 Sol Jo 569 (Irish Free State's requirement for original will).

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 58 (amended by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. The fee for inspection of a will or other document retained by the registry (in the presence of an officer of the registry) is £15: Non-Contentious Probate Fees Order 1999, SI 1999/688, art 3, Sch 1 Fee 7.

8 An office copy, or a sealed and certified copy, of any will or part of a will open to inspection under the Supreme Court Act 1981 s 124 (see the text to note 6 supra) or of any grant may, on payment of the prescribed fee, be obtained: (1) from the registry in which in accordance with s 124 the will or documents relating to the grant are preserved; (2) where in accordance with that provision the will or such documents are preserved in some place other than a registry, from the principal registry of the Family Division; or (3) subject to the approval of the Senior Registrar of the Family Division, from the principal registry in any case where the will was proved in or the grant was issued from a district probate registry: s 125. Where copies are required of original wills or other documents deposited under s 124, such copies may be facsimile copies sealed with the seal of the court and issued either as office copies or certified under the hand of a district judge or registrar to be true copies: Non-Contentious Probate Rules 1987, SI 1987/2024, r 59 (amended by SI 1991/1876). As to postal and personal applications for copies of wills or grants see *Practice Direction* [1990] 3 All ER 734, [1990] 1 WLR 1510. For fees for copies of documents and for handling postal applications see the Non-Contentious Probate Fees Order 1999, SI 1999/688, Sch 1 Fee 8.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

132 Completing the record

NOTE 4--The following further requirements are now imposed with regard to the information appearing on grants of representation and in probate records (1) with regard to the last address of the deceased (see head (2)), the postcode, if known, must be stated; and (2) with regard to excepted estates (see head (6)), the net value of the estate must be stated, rounded up to the next whole thousand, and expressed as 'not exceeding £[...]': *Practice Direction* [2002] 2 All ER 640.

TEXT AND NOTE 6--Supreme Court Act 1981 s 124 (now Senior Courts Act 1981 s 124) amended: Constitutional Reform Act 2005 Sch 2 para 5.

NOTES 7, 8--SI 1999/688 revoked: SI 2004/3123. SI 1999/688 art 3, Sch 1 Fees 7, 8 now the Non-Contentious Probate Fees Order 2004, SI 2004/3120, art 2, Sch 1 Fees 7, 8.

NOTE 7--See *Brown v Executors of the Estate of Her Majesty Queen Elizabeth the Queen Mother* [2008] EWCA Civ 56, [2008] 1 WLR 2327, [2008] All ER (D) 118 (Feb) (public inspection of royal will).

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133. Proof of due execution.

Where the will is perfect on the face of it and there is an attestation clause showing that the statutory requirements¹ have been complied with, probate in common form issues on the oath of the executor alone.

If, however, the will contains no attestation clause, or if the attestation clause is insufficient, or it appears to the district judge² or registrar³ that there is doubt about the due execution of the will, before admitting the will to proof, he must require an affidavit as to due execution from one or more of the attesting witnesses or, if no attesting witness is conveniently available, from any other person who was present when the will was executed⁴. If the district judge or registrar, after considering the evidence, is satisfied that the will was not duly executed, he must refuse probate and mark the will accordingly⁵. If no such affidavit can be obtained, the district judge or registrar may accept affidavit evidence from any person he may think fit to show that the signature on the will is in the deceased's handwriting, or of any other matter which may raise a presumption in favour of the due execution of the will⁶. He may also if he thinks fit require that notice of the application be given to any person who may be prejudiced by the will⁷.

Even though there may be no evidence of due execution, a district judge or registrar may accept a will for proof if he is satisfied that the distribution of the estate is not affected as a result⁸.

1 As to the statutory requirements see PARA 103 note 4 ante.

2 For the meaning of 'district judge' see PARA 27 note 6 ante.

3 For the meaning of 'registrar' see PARA 27 note 7 ante.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 12(1) (r 12 amended by SI 1991/1876). The Non-Contentious Probate Rules 1987, SI 1987/2024, rr 12-15 (as amended) do not apply to any will which it is sought to establish otherwise than by reference to the Wills Act 1837 s 9 (as substituted) (see WILLS vol 50 (2005 Reissue) PARA 351 et seq): Non-Contentious Probate Rules 1987, SI 1987/2024, r 17(1). Such a will may be established on the district judge or registrar being satisfied as to its terms and validity, and includes (without prejudice to the generality of the foregoing): (1) any will to which r 18 (as amended) applies (see PARA 117 ante); and (2) any will which, by virtue of the Wills Act 1963, is to be treated as properly executed if executed according to the internal law of the territory or state referred to in s 1 (see WILLS vol 50 (2005 Reissue) PARA 310): Non-Contentious Probate Rules 1987, SI 1987/2024, r 17(2) (amended by SI 1991/1876).

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 12(1) (as amended: see note 4 supra).

6 Ibid r 12(2) (as amended: see note 4 supra).

7 Ibid r 12(2) (as amended: see note 4 supra).

8 Ibid r 12(3) (as amended: see note 4 supra). As to the presumption of due execution see PARA 304 post.

UPDATE**72-268 The Grant of Probate or Administration**

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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134. Wills of blind or illiterate testators.

Before admitting to proof a will which appears to have been signed by a blind or illiterate testator or by another person by direction of the testator, or which for any other reason raises doubt as to the testator having had knowledge of the contents of the will at the time of its execution, the district judge¹ or registrar² must satisfy himself³ that the testator had such knowledge⁴.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 A district judge or registrar may require an affidavit from any person he thinks fit for the purpose of satisfying himself as to this matter or to any of the matters referred to in the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 14, 15 (both as amended) (see PARAS 135-137 post), and in any such affidavit sworn by an attesting witness or other person present at the time of the execution of a will the deponent must depose to the manner in which the will was executed: r 16 (amended by SI 1991/1876).

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 13 (amended by SI 1991/1876). See also *Edwards v Fincham* (1842) 4 Moo PCC 198.

UPDATE**72-268 The Grant of Probate or Administration**

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/135. Obliterations, interlineations and alterations.

135. Obliterations, interlineations and alterations.

Where there appears in a will any obliteration, interlineation or other alteration which is not authenticated in the manner prescribed by statute¹, or by the re-execution of the will or by the execution of a codicil, the district judge² or registrar³ must require evidence⁴ to show whether the alteration was present at the time the will was executed and must give directions as to the form in which the will is to be proved⁵, except where the alteration appears to the district judge or registrar to be of no practical importance⁶. Where necessary the court will allow the use of artificial means to decipher original words or figures⁷, but will not resort to physical interference with the document; a magnifying glass may be used, but not chemicals⁸. Writing is not apparent for the purpose of the statutory provisions⁹ if it can be read only on the creation of a new document, as for example a photograph taken by infra-red rays¹⁰.

1 See the Wills Act 1837 s 21 (as amended); and WILLS vol 50 (2005 Reissue) PARA 374.

2 For the meaning of 'district judge' see PARA 27 note 6 ante.

3 For the meaning of 'registrar' see PARA 27 note 7 ante.

4 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 16 (as amended); and PARA 134 note 3 ante.

5 Ibid r 14(1) (r 14(1), (2) amended by SI 1991/1876). See, however, the Non-Contentious Probate Rules 1987, SI 1987/2024, r 17 (as amended); and PARA 133 note 4 ante.

6 Ibid r 14(2) (as amended: see note 5 supra).

7 *Re Itter, Dedman v Godfrey* [1948] 2 All ER 1052.

8 *Ffinch v Combe* [1894] P 191 at 201 per Sir F Jeune P; *Townley v Watson* (1844) 3 Curt 761. In *Re Gilbert* [1893] P 183, words had been written on the back of the codicil and a piece of blank paper had been pasted over them. The court ordered the blank paper to be removed.

9 See for the purposes of the Wills Act 1837 s 21 (as amended): see WILLS vol 50 (2005 Reissue) PARA 374.

10 *Re Itter, Dedman v Godfrey* [1950] P 130, [1950] 1 All ER 68.

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72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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136. Document attached to or incorporated in will.

If a will contains any reference to another document in such terms as to suggest that it ought to be incorporated¹ in the will, the district judge² or registrar³ must require the document to be produced and may call for such evidence⁴ in regard to the incorporation of the document as he thinks fit⁵. However, when application is made to admit to proof a will which incorporates standard forms or clauses as contained in a published document, production of that document will not be required in any individual case, unless otherwise directed, if the published document containing the standard forms or clauses (together with as many copies as may be required) has been previously lodged with the senior district judge and accepted by him as sufficient lodgment⁶.

1 As to incorporation of documents see PARA 105 ante.

2 For the meaning of 'district judge' see PARA 27 note 6 ante.

3 For the meaning of 'registrar' see PARA 27 note 7 ante.

4 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 16 (as amended); and PARA 134 note 3 ante.

5 Ibid r 14(3) (amended by SI 1991/1876). See, however, the Non-Contentious Probate Rules 1987, SI 1987/2024, r 17 (as amended); and PARA 133 note 4 ante. As to the probate registries' practice of examining instruments to ensure that they have been properly and duly stamped under the Stamp Act 1891 see *Practice Direction* [1978] 1 All ER 1046, [1978] 1 WLR 430 (as extended by Secretary's Circular, 10 September 1987).

6 *Practice Direction* [1995] 1 FLR 766.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/137. Doubts as to date or revocation of will.

137. Doubts as to date or revocation of will.

Where there is doubt as to the date on which a will was executed, the district judge¹ or registrar² may require such evidence³ as he thinks necessary to establish the date⁴.

Any appearance of attempted revocation of a will by burning, tearing or otherwise destroying and every other circumstance leading to a presumption of revocation by the testator⁵ must be accounted for⁶ to the district judge's or registrar's satisfaction⁷.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 16 (as amended); and PARA 134 note 3 ante.

4 Ibid r 14(4) (amended by SI 1991/1876). See, however, the Non-Contentious Probate Rules 1987, SI 1987/2024, r 17 (as amended); and PARA 133 note 4 ante.

5 As to revocation see the Wills Act 1837 s 20 (as amended); and WILLS vol 50 (2005 Reissue) PARA 385.

6 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 16 (as amended); and PARA 134 note 3 ante.

7 Ibid r 15 (amended by SI 1991/1876). See, however, the Non-Contentious Probate Rules 1987, SI 1987/2024, r 17 (as amended); and PARA 133 note 4 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/138. Misdescription of executor.

138. Misdescription of executor.

Where the will contains a misdescription or an insufficient description of the person nominated as executor, the grant issues to the person who, according to the evidence, was actually intended by his correct description, with the addition of the description written in the will¹.

¹ *Re De Rosaz* (1877) 2 PD 66; *Re Cooper* [1899] P 193; *Re Baskett* (1898) 78 LT 843. See also PARA 128 note 16 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/139. Exclusion of words from probate.

139. Exclusion of words from probate.

Apart from the court's jurisdiction to rectify the will of a testator who dies after 1983¹, the court has a strictly limited jurisdiction² to omit from probate something contained in the will as a result of fraud or inadvertence which is proved not to be part of the testator's will³. The jurisdiction, where it exists, is confined to the exclusion of words⁴ and does not extend to the insertion of words, since this would run counter to the provisions of the Wills Act 1837⁵, nor does it extend to the exclusion of words where the exclusion will alter the sense of what remains, for this would be equivalent to making a new will for the testator⁶. Exclusions have been allowed to remove clerical errors⁷ and words inserted as a result of a testator's own mistake⁸ or the mistake of his advisers⁹. The court also has power to omit from the probate the signature of a third person at the foot of a will which already bears the signatures of two attesting witnesses, on being satisfied that the third signature was not added with the object of attesting the will¹⁰. Offensive, scandalous, libellous, blasphemous or undesirable passages having no testamentary relevance¹¹ may also be omitted from the probate and from any copy of the will subsequently ordered¹², but this is a power to be exercised with great moderation¹³, for a testator has the right to explain why he has disposed of his property in a certain way although he has no right to libel anybody in his will by using words which have no direct bearing on the devolution of his property¹⁴. The court has refused to expunge or strike out the offending words from the original will¹⁵.

¹ *Ie* under the Administration of Justice Act 1982 s 20: see PARA 141 post; and WILLS vol 50 (2005 Reissue) PARA 408.

² *Re Horrocks, Taylor v Kershaw* [1939] P 198 at 216, [1939] 1 All ER 579 at 584, CA.

³ *Rhodes v Rhodes* (1882) 7 App Cas 192 at 198, PC. As to the effect of approval by the testator of matter which it is sought to exclude see PARA 321 post. As to the effect of incapacity (eg delusions), undue influence or fraud as to part only of a will see PARA 301 post.

4 Re Schott [1901] P 190 (overruling Re Bushell (1887) 13 PD 7 on this point); Jane v Jane (1917) 33 TLR 389 (omission of words in codicil referring by mistake to wrong will); Re Clark (1932) 101 LJP 27 (exclusion of misdescription of legatee).

5 Re Horrocks, Taylor v Kershaw [1939] P 198 at 216, [1939] 1 All ER 579 at 584, CA.

6 Re Horrocks, Taylor v Kershaw [1939] P 198 at 218-219, [1939] 1 All ER 579 at 586, CA.

7 Re Bushell (1887) 13 PD 7; Re Huddleston (1890) 63 LT 255; Re Boehm [1891] P 247.

8 Re Swords [1952] P 368, [1952] 2 All ER 281; Re Phelan [1972] Fam 33, [1971] 3 All ER 1256.

9 Re Oswald (1874) LR 3 P & D 162; Morrell v Morrell (1882) 7 PD 68; Re Moore [1892] P 378; Re Boehm [1891] P 247; Re Reade [1902] P 75; Re Morris [1971] P 62, [1970] 1 All ER 1057.

10 Re Sharman (1869) LR 1 P & D 661; Re Smith (1889) 15 PD 2; Kitcat v King [1930] P 266 (where two beneficiaries' signatures under the attestation clause were omitted from the probate). As to the effect of superfluous signatures on the avoidance of gifts to attesting witnesses see the Wills Act 1968 s 1; and WILLS vol 50 (2005 Reissue) PARA 346.

11 Re T (1961) 105 Sol Jo 325 (testator entitled to give his reasons so long as he does not go too far; part of passage expunged).

12 Re Wartnaby (1846) 1 Rob Eccl 423; Marsh v Marsh (1860) 1 Sw & Tr 528; Re White [1914] P 153; Re Heywood [1916] P 47 (part of a soldier's will omitted from probate on representations of military authorities); Re Caie (1927) 43 TLR 697 (views on religious subjects cannot be suppressed because they are disliked); Re Maxwell (1929) 140 LT 471; Re Bowker [1932] P 93 (words relating to disposal of body).

13 Re Honywood (1871) LR 2 P & D 251.

14 Re Hall [1943] 1 All ER 159.

15 Curtis v Curtis (1825) 3 Add 33; Re White [1914] P 153; Re Maxwell (1929) 140 LT 471; Re C (1960) Times, 28 July ('After five years my wife has shown no sign or wish of returning to me and I must presume her legal desertion': application to expunge refused because, although potentially defamatory, the words gave the version of a testator unable to speak for himself and could be relevant in family provision proceedings).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/140. Practice on application for exclusion.

140. Practice on application for exclusion.

A contested application for omission of words from probate¹, must, after the issue of a claim form, be made or referred to the Chancery Division². Other applications are to be made without notice to the district judge or registrar of the registry at which it is proposed to make application for the grant and must be supported by affidavit evidence, exhibiting the will or codicil in question, together with any written consents of persons not under disability who might be prejudiced³. A copy of any order made on the application should be lodged with the application for the grant, and will be annexed to the original will⁴.

1 See PARA 139 ante.

2 See PARA 74 ante.

3 *Practice Direction* [1968] 2 All ER 592, [1968] 1 WLR 987. If the district judge or registrar is satisfied on the facts and, in the absence of consent, that there is no substantial interest unprotected, he will make the order: see *Practice Direction* supra. A district judge or registrar may require the application to be made by summons to a judge: see PARA 97 ante.

4 *Practice Direction* [1968] 2 All ER 592, [1968] 1 WLR 987. A typewritten copy of the will omitting the words in question should also be lodged for the fiat to be written in the margin before photography: *Practice Direction* supra.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/141. Rectification.

141. Rectification.

If a court is satisfied that the will of a testator who dies on or after 1 January 1983¹ is so expressed that it fails to carry out the testator's intentions, in consequence of a clerical error or a failure to understand his instructions, it may order that the will be rectified so as to carry out his intentions². Where an application for rectification is not contested, it may be made to a district judge or registrar³. The application must be supported by an affidavit, setting out the grounds of the application, together with such evidence as can be adduced as to the testator's intentions, and in what respects they were not understood, or the nature of the alleged clerical error (as the case may be)⁴. Unless otherwise directed, notice of the application must be given to every person having an interest under the will whose interest might be prejudiced, or such other person who might be prejudiced, by the rectification applied for, and any comments in writing by any such person must be exhibited to the affidavit in support of the application⁵. If the district judge or registrar is satisfied that, subject to any direction to the contrary, notice

has been given to every person interested, and that the application is unopposed, he may order that the will be rectified accordingly⁶.

1 le the date on which the Administration of Justice Act 1982 s 20 came into force: see s 76(11).

2 Ibid s 20(1). An application for an order under this provision cannot, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out: see s 20(2). See also WILLS vol 50 (2005 Reissue) PARA 408.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 55(1) (amended by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. Such an application may not be made if a probate action has been commenced: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 55(1) (as so amended). It is not until a claim form has been issued that there is litigation between the parties: see *Moran v Place* [1896] P 214, CA; *Salter v Salter* [1896] P 291, CA.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 55(2).

5 Ibid r 55(3) (amended by SI 1999/1903).

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 55(4) (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

141 Rectification

NOTES--For the procedure relating to claims for the rectification of a will see PARA 298.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/142. Time for issuing grant.

142. Time for issuing grant.

No grant of probate or letters of administration with the will annexed may issue within seven days of the death of the deceased, except with the leave of a district judge or registrar¹. A district judge or registrar must not allow any grant to issue until all inquiries which he may see fit to make have been answered to his satisfaction². No grant may be made by a registrar in any case in which there is contention, until the contention is disposed of³, or in any case in which it appears to him that a grant ought not to be made without the directions of a judge or district judge⁴, in which case the registrar must send a statement of the matter in question to the principal registry of the Family Division for directions⁵. A district judge may either confirm

that the matter be referred to a judge and give directions accordingly or may direct the registrar to proceed with the matter in accordance with such instructions as are deemed necessary, which may include a direction to take no further action in relation to the matter⁶.

1 Non-Contentious Probate Rules 1987, SI 1987/2024, r 6(2) (r 6 amended by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. As to ordinary grants of administration see PARA 194 post.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 6(1) (as amended: see note 1 supra).

3 Ibid r 7(1)(a) (r 7 amended by SI 1991/1876).

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 7(1)(b) (as amended: see note 3 supra).

5 Ibid r 7(2) (as amended: see note 3 supra).

6 Ibid r 7(3) (as amended: see note 3 supra).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/143. Proof of death.

143. Proof of death.

The executor's oath specifies the fact and date of the testator's death¹. A certificate of death or of presumed death issued by the Registrar General from the register kept of births and deaths in civil aircraft² may be accepted as sufficient evidence of death on application for a grant of representation³. Certain other special certificates of death or presumed death issued by government departments, including the Registrar General of Shipping and Seamen and the service authorities, may be accepted as evidence of death⁴.

Where the applicant for a grant is unable to depose to the precise date of death, but the fact of death is certain, the district judge or registrar may make the grant if the applicant swears that the deceased died on the earliest or the latest possible date when death could have occurred, or on some day between the two⁵.

1 See *Practice Direction* [1999] 1 All ER 832. See also PARA 128 ante.

2 See AIR LAW vol 2 (2008) PARAS 586-587. As to registration of deaths see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 561 et seq.

3 *Practice Note* (1953) 103 L Jo 299.

4 See Tristram and Coote's Probate Practice (28th Edn) 136-139. See also SHIPPING AND MARITIME LAW vol 94 (2008) PARAS 654-655.

5 *Re Long-Sutton* [1912] P 97 (testator found drowned; no order for leave to swear death necessary).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/144. Leave to swear to death.

144. Leave to swear to death.

On an application for a grant of probate or administration where there is no direct evidence of death, for example where a person has disappeared and his body has not been found, an application must also be made for leave to swear to the death¹.

An application for leave to swear to the death of a person in whose estate a grant² is sought may be made to a district judge or registrar³. The application must be supported by an affidavit setting out the grounds of the application and containing particulars of any insurance policies effected on the life of the presumed deceased together with such further evidence as the district judge or registrar may require⁴. The affidavit should generally state: (1) when and in what circumstances the person who has disappeared was last seen or heard of; (2) whether any advertisements have been inserted for the purpose of ascertaining his whereabouts, and if so, in what newspapers⁵ and with what result; (3) the applicant's belief that the alleged deceased is dead⁶; (4) whether any letters have been received from him⁷; (5) whether he left any will⁸ or died intestate; (6) who are entitled on intestacy; (7) if there is real estate and the death may have occurred before 1926, who is the heir at law⁹; and (8) particulars of the estate. The district judge or registrar¹⁰ must be satisfied that all reasonable inquiries have been made¹¹.

1 The probate court does not find as a fact the death of the deceased; it merely gives the applicant leave to swear to death: see *Re Jackson* (1902) 87 LT 747. The leave and a grant of administration under the court's discretionary power (see PARA 180 post) may be given simultaneously on the same application if the circumstances so warrant: *Re Lever* (1935) 105 LJP 9.

2 For the meaning of 'grant' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 53 (amended by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. As to the presumption of death see PARA 145 post.

4 Non-Contentious Probate Rules 1987, SI 1987/2024 r 53 (as amended: see note 3 supra). See also *Re Saul* [1896] P 151; *Re Barber* (1886) 11 PD 78.

5 Copies of the newspapers should be filed.

6 *Re Hurlston* [1898] P 27; *Re Walker* [1909] P 115.

7 *Re Clarke* [1896] P 287. Any letters received should be filed.

8 Any will should be filed.

9 There may be cases where the heir is interested in the estate even though the death occurs after 1925, for example where a person who was not of testamentary capacity on 1 January 1926 dies intestate without having recovered such capacity. In these cases the name of the heir must be disclosed. As to such cases see PARAS 584, 631 et seq post.

10 Cf the Non-Contentious Probate Rules 1987, SI 1987/2024, r 6(1) (as amended): see PARA 142 ante.

11 *Re Robertson* [1896] P 8, where the court insisted on advertisements although nothing had been heard of the vanished person for 25 years. For a form of affidavit exhibiting a certificate of the Registrar General of Shipping and Seamen in the case of supposed death through the loss of a ship see *Re Dodd* (1897) 77 LT 137 (cf para 143 text and note 4 ante).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/145. Presumption of death.

145. Presumption of death.

If there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more, and it can be proved (1) that there are persons who would be likely to have heard of him over that period¹; (2) that those persons have not heard of him; and (3) that all due inquiries have been made appropriate to the circumstances, without result, then the presumption of law is that the person died within the period². Subject to this presumption, the issue whether a person is to be presumed dead is a question of fact³. On proof of sufficient inquiries, the court will, however, allow the death of a testator to be sworn after a disappearance of less than seven years⁴.

If the courts of a foreign country where the presumed deceased was domiciled have made orders presuming his death and vesting his estate in the persons entitled, his death will be presumed without further evidence, but if there is only an order by the foreign court presuming the death but not vesting the estate, the Family Division requires further evidence to show that he is in fact dead⁵.

1 See *Re Liebeskind* [1952] CLY 1349 (applicant could not expect to hear from relative if relative behind the Iron Curtain).

2 See *Chard v Chard (otherwise Northcott)* [1956] P 259 at 272, [1955] 3 All ER 721 at 728 per Sachs J. See also CIVIL PROCEDURE vol 11 (2009) PARA 1100. There is no presumption that the person died at any particular date during the seven years, or that he died without issue: see CIVIL PROCEDURE vol 11 (2009) PARAS 1101-1102.

3 See *Chard v Chard (otherwise, Northcott)* [1956] P 259, [1955] 3 All ER 721. See also CIVIL PROCEDURE vol 11 (2009) PARAS 1100-1101. As to a county court order as evidence of death see *Re Rishton* (1921) 90 LJP 374 (see PARA 183 note 2 post).

4 *Re Matthews* [1898] P 17. See also *Re Winstone* [1898] P 143; *Re Long-Sutton* [1912] P 97; *Greig v Merchant Co of Edinburgh* 1921 SC 76.

5 *Re Spenceley* [1892] P 255; *Re Schulhof, Re Wolf* [1948] P 66, [1947] 2 All ER 841; *Re Dowds* [1948] P 256. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/146. Commorientes after 1925.

146. Commorientes after 1925.

In cases where, after 31 December 1925, two or more persons have died in circumstances rendering it uncertain¹ which of them survived the other or others, then, subject to any order of the court², the deaths must, for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger is deemed to have survived the elder³, even if it appears that the deaths were simultaneous⁴.

The statutory presumption is, however, excluded by an express contrary provision in a will⁵. If after 31 December 1952 an intestate and the intestate's husband or wife die in such circumstances that by virtue of the statutory presumption the husband or wife is deemed to have survived the intestate, the intestate's estate must nevertheless be distributed⁶ as if the

husband or wife had not survived⁷. For this purpose an intestate includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate⁸.

1 If there is evidence leading to a defined and warranted conclusion that one died before the other, the element of uncertainty is lacking and consequently the presumption never arises: *Re Bate, Chillingworth v Bate* [1947] 2 All ER 418 (applying a dictum of Viscount Simon C in *Hickman v Peacey* [1945] AC 304, [1945] 2 All ER 215, HL). Available evidence should be submitted as soon as possible to a registrar; affidavits from the person who found and the doctor who examined the bodies may be sufficient: see *Practice Direction* [1964] 2 All ER 771, [1964] 1 WLR 1027.

2 These words do not give the court power to disregard the presumption; they enable it to receive evidence in rebuttal but give it no discretion to disregard the presumption on the ground of unfairness or injustice: *Re Lindop, Lee-Barber v Reynolds* [1942] Ch 377 at 382, [1942] 2 All ER 46 at 48 per Bennett J.

3 Law of Property Act 1925 s 184.

4 See *Hickman v Peacey* [1945] AC 304, [1945] 2 All ER 215, HL.

5 *Re Guggenheim* (1941) Times, 20 June (declaration by testator that in the event of his wife and himself dying simultaneously or in such circumstances that there be no evidence whether he or his wife died first, his wife should be deemed to have predeceased him); *Re Pringle, Baker v Matheson* [1946] Ch 124, [1946] 1 All ER 88; cf *Re Rowland, Smith v Russell* [1963] Ch 1, [1962] 2 All ER 837, CA. As to the construction of wills see WILLS vol 50 (2005 Reissue) PARA 513 et seq.

6 Ie under the Administration of Estates Act 1925 s 46 (as amended) (see PARA 591 et seq post): see s 46(3) (as added: see note 7 infra).

7 Ibid s 46(3) (added by the Intestates' Estates Act 1952 s 1(4)). Where husband and wife die together both intestate, the effect is that the estate of each is distributed on the footing that the other did not survive, since in the distribution of the estate of the younger the general statutory presumption applies that the younger survived the elder, while in the distribution of the estate of the elder the effect of the presumption is negated.

8 See the definition of 'intestate' in the Administration of Estates Act 1925 s 55(1)(vi); and PARA 555 note 1 post. As to the application to a partial intestacy of the statutory provisions for the distribution of intestates' estates see PARAS 585, 615 et seq post. It seems that s 46(3) (as added) (see the text to note 7 supra) varies the effect of the ordinary statutory presumption of survivorship only in the case of a person who would be treated as dying intestate apart from the provision, and that a person who leaves a will disposing of his or her whole estate in favour of a wife or husband is not intestate for the purposes of the provision if by virtue of the ordinary statutory presumption the wife or husband is deemed to have survived that person.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

146 Commorientes after 1925

TEXT AND NOTES 7, 8--In Administration of Estates Act 1925 s 46 for 'husband or wife' (in each place) read 'spouse or civil partner': Civil Partnership Act 2004 Sch 4 para 7.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(i) How and by Whom Obtained/147. Commorientes before 1926.

147. Commorientes before 1926.

Where two people in immediate succession to each other, whether by will or on an intestacy, perished before 1926 by the same calamity, the court refused to presume that one survived the other or that they died at the same moment¹. The burden of proof lay on the party asserting survival, concurrent decease or predecease². In the absence of any evidence as to which survived the other, on intestacy or where each had appointed the other executor, the surviving next of kin of each was entitled to a grant of administration, and the court gave leave to swear the death of each, allowing the applicant in each case to vary the usual form of oath by stating in it that there was no reason to believe that either survived the other³.

Where a testator and his residuary legatee died in the same calamity, there being no evidence of survivorship, and there was no executor, the testator's next of kin was preferred to the representative of the residuary legatee for a grant of administration with the will annexed⁴.

1 *Underwood v Wing* (1854) 4 De GM & G 633; affd sub nom *Wing v Angrave* (1860) 8 HL Cas 183 (husband and wife drowned together). In the following earlier cases presumptions as to commorientes were adopted, but they were decided in the ecclesiastical courts, and under the influence of the civil law (as to the extensive use of presumptions in that system see Thayer on Evidence (1898 Edn) 341-345). As to the presumption that the parties died at the same moment see: *Wright v Netherwood* (1793) 2 Salk 593n; *Taylor v Diplock* (1815) 2 Phillim 261; *Satterthwaite v Powell* (1838) 1 Curt 705). As to the presumption that the husband survived the wife see: *Colvin v Procurator-General* (1827) 1 Hag Ecc 92; *Re Selwyn* (1831) 3 Hag Ecc 748; *Re Murray* (1837) 1 Curt 596.

2 *Mason v Mason* (1816) 1 Mer 308; *Re Wainwright* (1858) 1 Sw & Tr 257; *Wing v Angrave* (1860) 8 HL Cas 183; *Barnett v Tugwell* (1862) 31 Beav 232; *Re Nicholls* (1872) LR 2 P & D 461; *Wollaston v Berkeley* (1876) 2 ChD 213; *Re Nightingale, Hargreaves v Shuttleworth* (1927) 71 Sol Jo 542.

3 *Re Wheeler* (1861) 31 LJP & A 40; *Re Beynon* [1901] P 141 (intestacies); *Re Alston* [1892] P 142 (mutual wills). See also *Re Wainwright* (1858) 1 Sw & Tr 257; *Re Ewart* (1859) 1 Sw & Tr 258; *Re Johnson* (1897) 78 LT 85; *Re Good* (1908) 24 TLR 493; *Re Bruce and Bruce* (1910) 26 TLR 381. As to the practice see *Re Roby* [1913] P 6 (application to be made in first instance in principal registry).

4 *Taylor v Diplock* (1815) 2 Phillim 261 (husband and wife in same wreck); cf *Re Shilling* (1856) Dea & Sw 183.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(ii) Limited Probates/148. General and limited grants.

(ii) Limited Probates

148. General and limited grants.

In a simple case the executors obtain a general grant¹ to the whole estate of the testator, and they alone are his personal representatives and are charged with the administration of all his property. In some cases, however, the testator appoints special executors and, in the case of land settled before the testator's death, and which continues to be settled after his death, special executors are deemed to be appointed by statute².

It was formerly the practice to make a limited grant of probate of the will of a married woman³.

1 This is equally the case where there is a single executor.

2 See PARAS 11-12 ante. As to settled land grants see PARA 229 et seq post. The procedure on application for probate limited to part of the estate is the same as for administration so limited: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 51 (as amended); and PARA 229 post.

3 The practice was changed as a result of the Married Women's Property Act 1882: see *Re Price* (1887) 12 PD 137. See also PARA 228 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(ii) Limited Probates/149. Types of limited grant.

149. Types of limited grant.

If the special executor¹ obtains his grant (limited to the property or purposes for which he is appointed) first, the subsequent grant made to the other executor is called a caeterorum grant. If that other executor is the first to apply, he obtains a grant save and except the property in respect of which the special executor has been appointed².

Where a testator appoints a separate executor for the purpose of carrying into effect the trusts and dispositions of a codicil, probate limited to those trusts and dispositions is granted to that executor. A similar grant is made to a person who is appointed executor for a special purpose or in respect of a specific fund only³.

1 As to general and special executors see PARA 11 ante.

2 It would appear to be the district judges' or registrars' practice to make a limited and a general grant wherever the special executor is appointed generally. As to the fees payable see PARA 82 ante.

3 See PARA 6 et seq ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(ii) Limited Probates/150. Grant limited to property appointed.

150. Grant limited to property appointed.

Where a testator has made a will which has been revoked by his subsequent marriage¹ but which contains an exercise of a special power of appointment², the court grants administration with the will annexed to the appointee limited to the property appointed³.

1 For the general rule that a will is revoked by marriage and the exception in the case of a disposition in a will made in exercise of a power of appointment see the Wills Act 1837 s 18 (as substituted); and WILLS vol 50 (2005 Reissue) PARA 379; POWERS vol 36(2) (Reissue) PARA 352.

2 As to special powers of appointment see POWERS vol 36(2) (Reissue) PARA 318 et seq.

3 *Re Russell* (1890) 15 PD 111; *Re Poole, Poole v Poole* [1919] P 10 (general grant to widow, with so much of will annexed as related to appointed fund, after revocation of will exercising general power).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(ii) Limited Probates/151. Grant limited to time.

151. Grant limited to time.

Probate of the contents of a lost will is limited until the original or a more authentic copy is proved¹. A similar limitation is contained in the probate of a copy of the will of a British subject made abroad when the original is detained in a foreign country², unless it is retained in the custody of a foreign court or official³.

1 As to the procedure see PARA 130 ante. As to proof of contents see PARA 110 ante.

2 *Re Lemme* [1892] P 89; cf *Practice Note* [1942] WN 204. A grant limited as to time is followed by a second or cessate grant: see PARA 153 post. As to the procedure see PARA 130 ante.

3 See PARA 121 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(iii) Double and Cessate Grants/152. Double grants.

(iii) Double and Cessate Grants

152. Double grants.

Where by reason of their number¹ or otherwise the executors appointed by the will do not all prove, power may be reserved to the non-proving executors to prove at a later date. The

second grant will then be known as double probate. It is made in general terms, but the value of the estate is sworn as the value of the assets remaining unadministered at the date of the second grant and not as the original value in the first grant².

An Inland Revenue account is necessary in every case of a double grant, and must be lodged at the Capital Taxes Office³.

1 As to the limit on the number of executors to whom probate may be granted see PARA 7 ante.

2 For the practice in the case of a double grant see Tristram and Coote's Probate Practice (28th Edn) 448-449. See also *Re Griffin* (1910) 54 Sol Jo 378.

3 See the Supreme Court Act 1981 s 109 (as amended); and PARA 131 ante. As to the Capital Taxes Office see INHERITANCE TAXATION vol 24 (Reissue) PARA 405.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(iii) Double and Cessate Grants/153. Cessate or second grants.

153. Cessate or second grants.

Where a testator has directed that in a certain event some other person is to be substituted for his original executor, that other person becomes entitled upon the happening of the event to a grant in his own favour¹. Such a grant is known as a cessate or second grant, and differs from a grant *de bonis non administratis*² by being a re-grant of all the estate remaining, and by being a grant of probate and not of administration with the will annexed. The substituted executor takes the executor's oath, but swears the estate at the value only of what remains undistributed.

A second grant is also required upon the death of a person who has taken a grant for the use and benefit of a person under disability (for example a mentally disordered executor), and a cessate grant is made on the removal of a disability, as where a minor attains full age or a mentally disordered person recovers his capacity. If an executor becomes unfit to act, there must be a fresh grant³. Probate granted to an executrix during widowhood ceases on her remarriage, and a grant is made to the substituted executor.

Where a grant has been made of the contents of a lost will, a second grant is made upon the production of the original⁴. Where a codicil is found after probate of a will, a second grant is sometimes made.

An Inland Revenue account is necessary in every case of a double grant, and must be lodged at the Capital Taxes Office⁵.

1 *Re Foster* (1871) LR 2 P & D 304; *Re Freeman* (1931) 146 LT 143 (renunciation of executors; grant to person appointed by codicil to fill any vacancy). As to fees on second or subsequent grants see PARA 82 ante.

2 See PARA 201 post.

3 *Re Clifton* [1931] P 222.

4 See PARA 151 ante.

5 See the Administration of Estates Act 1981 s 109 (as amended); and PARA 131 ante. As to the Capital Taxes Office see INHERITANCE TAXATION vol 24 (Reissue) PARA 405. As to the practice in the case of a cessate grant see Tristram and Coote's Probate Practice (28th Edn) 443-447. See also *Re Griffin* (1910) 54 Sol Jo 378.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(3) PROBATE IN COMMON FORM/(iii) Double and Cessate Grants/154. Calling for account from holder of original grant.

154. Calling for account from holder of original grant.

A person who obtains a cessate grant¹ or a grant on the revocation of a previous grant may call upon the person in whose favour the original grant was made at any time after the determination of the original grant to exhibit an inventory and account². The order is usually obtained upon summons to a district judge or registrar³.

1 As to cessate grants see PARA 153 ante.

2 See *Taylor v Newton* (1752) 1 Lee 15; *Re Thomas* [1956] 3 All ER 897n, [1956] 1 WLR 1516 (cases of grants of administration; see further PARAS 207, 264 post); cf *Re Griffin* (1910) 54 Sol Jo 378 (a case of double probate: see PARA 153 ante). See also the Administration of Estates Act 1925 s 25 (see PARAS 256, 375, 377 post); and Tristram and Coote's Probate Practice (28th Edn) 510-511. Every executor in his oath undertakes to render an inventory and account whenever lawfully required to do so.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 61(2) (amended by SI 1991/1876). See also PARA 98 ante. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(i) In general/155. Foundation of jurisdiction.

(4) GENERAL GRANTS OF ADMINISTRATION

(i) In general

155. Foundation of jurisdiction.

Where a person dies intestate¹, representation to his estate is obtained by means of a grant of letters of administration². The foundation of the court's jurisdiction³ to make a grant is the existence of property belonging to the intestate within its jurisdiction to be distributed⁴. It was formerly absolutely essential to show that such property was in England or Wales⁵, but where it is necessary to obtain representation for a collateral purpose, administration may now be granted even though the deceased left no estate⁶. Accordingly, for example it may be necessary to constitute a personal representative of the deceased: (1) to enable legal proceedings in connection with the estate to be begun or defended; (2) to make title to estate or property vested in the deceased as trustee, and not beneficially; or (3) to enable a new trustee to be appointed. A grant of letters of administration may also be necessary in respect of settled land vested in the deceased⁷.

1 As to intestacy see PARA 583 et seq post. As to the form of grant where there is a testamentary instrument but no effective disposition of any property see PARA 199 post. As to the right to probate of a document purporting to dispose when there is no existing property see PARA 103 ante.

2 Where there is an alleged will and the parties interested under it have been cited to appear and propound it, but fail to do so, administration is granted as upon an intestacy: *Re Morton, Morton v Thorpe* (1863) 3 Sw & Tr 179; *Re Quick, Quick v Quick*[1899] P 187; *Re Bootle, Heaton v Whalley* (1901) 84 LT 570. See also *Re Dennis*[1899] P 191, following *Crosby v Noton* (1867) 36 LJP & M 55; *Re Gilbert*[1911] 2 IR 36. The grant is an order of the court: see PARA 75 ante.

3 See 13 Edw 1 (Statute of Westminster the Second) (1285) c 19; 31 Edw 3 stat 1 c 11 (Administration on Intestacy) (1357); 21 Hen 8 c 5 (1529); Statute of Distribution (1670) (all wholly repealed as regards deaths after 1925); Court of Probate Act 1857; Land Transfer Act 1897 (repealed as regards deaths after 1925); Administration of Estates Act 1925; Supreme Court of Judicature (Consolidation) Act 1925 (repealed); Intestates' Estates Act 1952; and the Supreme Court Act 1981.

4 *Re Tucker* (1864) 3 Sw & Tr 585.

5 *Evans v Burrell* (1859) 28 LJP & M 82; *Re Fittock* (1863) 32 LJP & M 157.

6 The High Court has all jurisdiction in relation to letters of administration as it had before 1982: see the Supreme Court Act 1981 s 25; and PARAS 73, 103 ante. Before 1982 it had jurisdiction to grant letters of administration where the deceased left no estate: see the Administration of Justice Act 1932 s 2(1) (repealed); and PARA 103 ante. For some years before 1932 the court had, when necessary, made a grant upon a declaration of personal belongings (eg clothes) of nominal amount.

7 As to settled land grants see PARA 229 et seq post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(i) In general/156. Grants on grounds other than intestacy.

156. Grants on grounds other than intestacy.

Letters of administration are granted, not only where the deceased died wholly intestate, but also where, in certain circumstances, he died leaving a will. In such cases letters of administration are granted with the will annexed¹.

¹ The grounds on which letters of administration with the will annexed are granted are outlined in PARAS 196-197 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(i) In general/157. Grant to foreign representative.

157. Grant to foreign representative.

Where the intestate dies domiciled abroad leaving property in England, the practice of the English court is to make a grant of letters of administration to the person recognised by the proper court of the country of domicile (including if necessary the foreign state itself if, according to its own law, it claims as successor to the intestate and not as the person entitled to bona vacantia)¹, unless that person is by English law personally disqualified from taking a grant, for instance a minor². Where the person who has obtained the foreign grant is an agent for the party entitled to it, the English court must be satisfied that the agent has authority to make the application in England before making an English grant to him³.

1 *Re Maldonado, State of Spain v Treasury Solicitor* [1954] P 223, [1953] 2 All ER 1579, CA. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

2 See PARA 203 et seq post.

3 See *Re Weaver* (1866) 36 LJP & M 41. See also PARA 252 post (priority in rights to such a grant and procedure); and PARA 208 et seq post (grants to attorneys and consular officers). As to the effect of an English grant of representation see generally CONFLICT OF LAWS vol 8(3) (Reissue) PARA 435; and as to the jurisdiction of the English court where it has made such a grant see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 441. Personal estate left in England by an intestate who dies domiciled abroad ranks as movable property and is governed by the law of that domicile at the date of the intestate's death; in such case the England court applies the doctrine of total renvoi: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 444.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(i) In general/158. Persons having prior rights to administer.

158. Persons having prior rights to administer.

Certain persons are recognised by law as being entitled to administer in priority to others¹, and in the absence of any grounds for the exercise of its discretionary power² the court has regard to these rights in making a grant.

In the case of persons dying wholly intestate after on or after 1 January 1926³, the persons having a beneficial interest in the estate are entitled to a grant of administration in the following classes in order of priority⁴:

- (1) the surviving husband or wife⁵;
- (2) the children of the deceased⁶ and the issue of any deceased child who died before the deceased⁷;
- (3) the father and mother of the deceased⁸;
- (4) brothers and sisters of the whole blood and the issue of any deceased brother or sister of the whole blood who died before the deceased⁹;
- (5) brothers and sister of the half blood and the issue of any deceased brother or sister of the half blood who died before the deceased¹⁰;
- (6) grandparents¹¹;
- (7) uncles and aunts of the whole blood and the issue of any deceased uncle or aunt of the whole blood who died before the deceased¹²; and
- (8) uncles and aunts of the half blood and the issue of any deceased uncle or aunt of the half blood who died before the deceased¹³.

For the purpose of determining the person or persons who would be entitled to a grant of representation in respect of the estate of a deceased person who dies on or after 4 April 1988, the deceased is presumed, unless the contrary is shown, not to have been survived by: (a) any person related to him whose father and mother were not married to each other at the time of his birth; or (b) by any person whose relationship with him is deduced through such a person as is mentioned in head (a) above¹⁴.

1 The broad principle upon which a grant is made can be expressed in the following manner: the grant goes according to the interest, live interests are preferred to dead ones, and administration is not granted to minors. An order of sequence is prescribed by the Non-Contentious Probate Rules 1987, SI 1987/2024, r 22: see the text to notes 4-13 *infra*; and PARA 159 *post*. As to the practice where an applicant's right to a grant depends upon legitimation see *Practice Direction* [1965] 2 All ER 560, [1965] 1 WLR 955.

2 See PARA 180 *post*.

3 As to the law of intestacy generally see PARA 583 *et seq post*; and for the cases subject to special rules see PARA 631 *et seq post*.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(1). As to the court's discretionary powers in making a grant see PARA 180 *post*.

5 *Ibid* r 22(1)(a).

6 As to the meaning of 'children' see PARA 588 *post*; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 3.

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(1)(b). As to the meaning of 'issue' see PARA 588 *post*.

8 *Ibid* r 22(1)(c). As to the meaning of 'father and mother of the deceased' see PARAS 588-589 *post*.

9 *Ibid* r 22(1)(d).

10 *Ibid* r 22(1)(e).

11 *Ibid* r 22(1)(f).

12 *Ibid* r 22(1)(g).

13 *Ibid* r 22(1)(h). Rule 22 does not operate to prevent a grant being made to any person to whom a grant may or may be required to be made under any enactment: r 28(1). Rule 22 also does not apply (except where probate is granted to an executor named, or according to the tenor (see PARA 118 *ante*), or where the whole

estate in England and Wales consists of immovables and a grant is made limited to those (see PARA 252 post)) where the deceased died domiciled outside England and Wales: r 28(2). As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

14 Family Law Reform Act 1987 s 21(1), (3). See *Practice Direction* [1988] 2 All ER 308, [1988] 1 WLR 610 for the rebuttal of the presumption and for the appropriate wording to be used in oaths on clearing off those with prior claims and to describe the applicant's relationship to the deceased.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

158 Persons having prior rights to administer

TEXT AND NOTE 5--SI 1987/2024 r 22(1)(a) amended: SI 2005/2114.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(i) In general/159. Persons entitled in default.

159. Persons entitled in default.

In default of any person having a beneficial interest in the estate, the Treasury Solicitor¹ is entitled to a grant of administration if he claims bona vacantia on behalf of the Crown². If all persons entitled to a grant in the case of intestacy³ have been cleared off, a grant may be made to a creditor of the deceased or to any person who, notwithstanding that he has no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion to it⁴.

Where all the persons entitled to the estate of the deceased have assigned their whole interest in it to one or more persons, the assignee or assignees replace the assignor in the order of priority for a grant of administration, or, if there are two or more assignors, the assignor with the highest priority⁵. Subject to the rule preferring living persons and persons not under disability where there are two or more persons entitled⁶, the personal representative of a person in a class entitled on intestacy⁷ or the personal representative of a creditor of the deceased has the same right to a grant as the person whom he represents⁸.

1 'The Treasury Solicitor' means the solicitor for the affairs of Her Majesty's Treasury and includes the solicitor for the affairs of the Duchy of Lancaster and the solicitor of the Duchy of Cornwall: Non-Contentious Probate Rules 1987, SI 1987/2024, r 2(1). In the Administration of Estates Act 1925 'the Treasury Solicitor' means the solicitor for the affairs of Her Majesty's Treasury and includes only the solicitor for the affairs of the Duchy of Lancaster: s 55(1)(xxv). As to grants to the Treasury Solicitor see PARA 171 post. As to the Treasury Solicitor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(2). As to the application of r 22 see PARA 158 note 13 ante. 'The Crown' includes the Crown in right of the Duchy of Lancaster and the Duke of Cornwall for the time being: r 2(1).

3 Ie under ibid r 22(1), (2) (see PARA 158 ante; and the text to note 2 supra): see r 22(3).

4 Ibid r 22(3). See PARA 158 note 14 ante. As to grants under the court's discretionary powers to persons other than those enumerated here see PARA 180 post; and as to limited grants for trust property see PARA 227 post.

5 Ibid r 24(1). Where there are two or more assignees, administration may be granted with the consent of the others to any one or more (not exceeding four) of them: r 24(2). In any case where administration is applied for by an assignee the original instrument of assignment must be produced and a copy of it lodged in the registry: r 24(3). See also PARA 198 post. For the meaning of 'registry' see PARA 76 note 2 ante.

6 Ie ibid r 27(5) (as amended) (see PARA 166 post): see r 22(4).

7 Ie a person in any of the classes in ibid r 22(1) (see PARA 158 heads (1)-(8) ante): see r 22(4).

8 Ibid r 22(4). Where, however, a spouse has died without taking a beneficial interest in the whole estate of the deceased as ascertained at the time of the application for the grant, the persons in r 22(1)(b)-(h) (see PARA 158 heads (2)-(8) ante) are preferred to that spouse's personal representative: r 22(4).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

159 Persons entitled in default

TEXT AND NOTES 6-8--SI 1987/2024 r 22(4) amended: SI 2005/2114.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(i) In general/160. Culpable homicide.

160. Culpable homicide.

Where a person has unlawfully killed the deceased, neither he nor his personal representatives will be granted letters of administration to the estate of the deceased person¹. Proof of the conviction of a person for an offence by any court in the United Kingdom or by a court martial is sufficient proof, in any civil proceedings where it is relevant, that he committed the offence, unless the contrary is proved².

1 *Re Crippen* [1911] P 108; *Re Hall, Hall v Knight and Baxter* [1914] P 1, CA. As to participation in the distribution of the deceased's estate see PARA 586 post; and WILLS vol 50 (2005 Reissue) PARAS 342.

2 See the Civil Evidence Act 1968 s 11 (as amended); and CIVIL PROCEDURE. For the meaning of 'United Kingdom' see PARA 18 note 4 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(i) In general/161. Number of administrators.

161. Number of administrators.

Administration may not be granted to more than four persons in respect of the same part of the estate of a deceased person¹. Where under an intestacy any beneficiary is a minor or a life interest arises, any grant of administration must be made either to a trust corporation (with or without an individual) or to not less than two individuals, unless it appears to the court to be expedient in all the circumstances to appoint an individual as sole administrator².

1 Supreme Court Act 1981 s 114(1). For the meaning of 'estate' see PARA 16 note 5 ante.

2 See *ibid* s 114(2). See also PARA 167 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(ii) Surviving Spouse/162. Right to grant.

(ii) Surviving Spouse

162. Right to grant.

The surviving husband or wife¹ is primarily entitled to a grant of administration of the estate of a person dying intestate after 1925².

The surviving husband or wife is passed over when the marriage was in fact void³, or where the husband⁴ or wife⁵ has obtained a divorce⁶.

In the case of deaths on or after 1 August 1970⁷ the effect of a decree of judicial separation is the same as that of divorce: the surviving spouse is excluded from all interest in the other's property⁸, and grants which are limited to such property as the deceased acquired since the date of the separation deed or order are now appropriate only in the case of deaths before 1 August 1970⁹.

Where a husband who is entitled to the whole of his wife's estate dies without having taken out administration to it, a grant of administration de bonis non issues to his representatives¹⁰ after representation to his own estate has been obtained¹¹, but where the wife's property is settled under an instrument by which it reverts to her family on her death¹², administration goes to the persons next entitled.

The surviving spouse's right to a grant is not one which vests in the trustee in bankruptcy, although under its discretionary jurisdiction the court has power to make a grant to the trustee¹³.

1 As to the essential requirements of marriage in English law see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 234 et seq.

2 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(1)(a); and PARA 158 ante.

3 *Browning v Reane* (1812) 2 Phillim 69 (marriage void for insanity); *Re Hay*(1865) LR 1 P & D 51.

4 *Re Nares* (1888) 13 PD 35.

5 *Re Wallas*[1905] P 326.

6 As to recognition of foreign divorces in non-contentious probate applications see PARA 163 post.

7 See the Matrimonial Proceedings and Property Act 1970 ss 40, 43(2) (repealed).

8 Accordingly if, while a decree of judicial separation is in force and the separation is continuing, either of the parties dies intestate, the estate devolves as if the other party to the marriage had then been dead: see the Matrimonial Causes Act 1973 s 18(2); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 209.

9 For examples of cases applicable in the case of deaths before 1 August 1970 see *Re Jones* (1904) 74 LJP 27; *Re Worman* (1859) 1 Sw & Tr 513; *Re Brighton* (1865) 34 LJPM & A 55. As to where the husband had by the deed of separation resigned all claim to the wife's property acquired after that date see *Allen v Humphrys* (1882) 8 PD 16; *Re Megson* (1899) 80 LT 295.

10 *Felder and Felder v Hanger* (1832) 3 Hag Ecc 769; Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(4) (see PARA 159 ante). If the husband has taken out a grant and only partially administered, the grant will be de bonis non. As to grants de bonis non see PARA 201 post.

11 *Partington v A-G*(1869) LR 4 HL 100; *Re Harding*(1872) LR 2 P & D 394. The same practice is now followed on the death of either spouse if absolutely entitled to the estate: see PARA 164 post.

12 *Re Pountney* (1832) 4 Hag Ecc 289. Where a daughter was entitled to a legacy under her father's will, and both she and her husband predeceased the father, leaving issue, administration limited to the legacy went to the daughter's next of kin without requiring the renunciation or citation of the husband's representative: *Re Councell* (1871) LR 2 P & D 314; cf *Re Basioli, McGahey v Depaoli* [1953] Ch 367, [1953] 1 All ER 301.

13 *Re Turner* (1886) 12 PD 18. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 404.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(ii) Surviving Spouse/163. Recognition of foreign divorce.

163. Recognition of foreign divorce.

The validity of a divorce or annulment obtained by means of judicial or other proceedings is recognised as valid in the United Kingdom¹ if it is effective under the law of the country in which it was obtained, and if at the date of the commencement of the proceedings in which it was obtained either party to the marriage: (1) was habitually resident in the country in which it was obtained; (2) was domiciled in that country; or (3) was a national of that country².

1 For the meaning of 'United Kingdom' see PARA 18 note 4 ante.

2 See the Family Law Act 1986 ss 45-48; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 255 et seq. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(ii) Surviving Spouse/164. Sole and joint grant.

164. Sole and joint grant.

A grant is made to the surviving spouse alone where he or she is the only person beneficially entitled under the intestacy¹, or where there is no life interest arising² and no minor is contingently entitled³ under the intestacy. Where a life interest arises or a minor is contingently entitled, the grant is usually a joint one⁴.

1 As to the circumstances in which the surviving spouse is the only person entitled see PARA 591 post.

2 As to the only circumstances in which a life interest arises in the case of a death on or after 1 January 1953 see PARA 592 post. In the case of a death on or after 1 January 1926 and before 1 January 1953, a life interest arose in all cases in which the surviving spouse was not absolutely entitled: see PARA 622 post.

3 As to the circumstances in which, in the case of a death on or after 1 January 1953, a minor may be contingently entitled see PARAS 603-604, 612 post. As to deaths on or after 1 January 1926 but before 1 January 1953 see PARA 624 post.

4 See PARA 167 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iii) Next of Kin/165. Next of kin among themselves.

(iii) Next of Kin

165. Next of kin among themselves.

Where there is a contest between persons equally entitled to a grant of administration¹, certain rules of preference are recognised: (1) preference is given to the next of kin² who has the support of the greatest interest³; (2) preference is given to the one who comes first for the

grant⁴; (3) primogeniture gives no right⁵, but if other things are precisely equal the fact of being the elder sibling may incline the balance⁶; (4) other things being equal, an individual accustomed to business is preferred⁷. Formerly, males may have been preferred to females⁸, but this preference is no longer followed.

1 For the order of priority see PARA 158 ante.

2 In speaking of deaths after 1925, 'next of kin' must be taken to refer only to such relatives as are entitled in distribution under the Administration of Estates Act 1925 ss 46, 47 (both as amended) (see PARA 591 et seq post); the Intestates' Estates Act 1952 ss 1 (as amended), 4, Sch 1 (see PARA 591 et seq post); and the Family Law Reform Act 1969 s 14(3) (repealed in relation to deaths after 4 April 1988) (see PARA 590 post).

3 *Elwes v Elwes* (1728) 2 Lee 573; *Budd v Silver* (1813) 2 Phillim 115.

4 *Cordeux v Trasler* (1865) 34 LJPM & A 127.

5 *Warwick v Greville* (1809) 1 Phillim 123 at 125.

6 *Coppin v Dillon* (1832) 4 Hag Ecc 361 at 376.

7 *Williams v Wilkins* (1812) 2 Phillim 100.

8 See *Chittenden v Knight* (1758) 2 Lee 559; *Iredale v Ford and Bramworth* (1859) 1 Sw & Tr 305; *Cordeux v Trasler* (1865) 34 LJPM & A 127; *Re Woolf* (1918) 34 TLR 477.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iii) Next of Kin/166. Circumstances affecting right of preference.

166. Circumstances affecting right of preference.

Unless a district judge¹ or registrar² otherwise directs, administration must be granted to a person of full age in preference to the guardian of a minor, and to a living person in preference to the personal representative of a deceased person³. The bankruptcy of one of two persons in equal degree of relationship is a reason for giving the preference to the other⁴. The fact that one of the next of kin is also a creditor is a reason against his being preferred in a contest for administration⁵. A person having an original interest is preferred to one with a derivative interest⁶, but the court may make the grant to the latter, even without requiring the former to be cited⁷.

A grant of administration may be made to any person entitled to it without notice to other persons entitled in the same degree⁸.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(5) (amended by SI 1991/1876). See also note 8 infra.

4 *Bell v Timiswood* (1812) 2 Phillim 22; *Iredale v Ford and Bramworth* (1859) 1 Sw & Tr 305. As to disqualification by reason of bankruptcy see PARA 20 ante; and as to other circumstances taken into account see PARA 181 post.

5 *Webb v Needham* (1823) 1 Add 494; *Re Toole* [1913] 2 IR 188. As to the rights of creditors see PARA 178 post.

6 *Re Carr* (1867) LR 1 P & D 291 at 292 per Sir JP Wilde.

7 *Re Kinchella* [1894] P 264. See also the Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(4); and the text to note 8 infra.

8 Ibid r 27(4). Disputes between persons entitled to a grant in the same degree must be brought by summons before a district judge or registrar: r 27(6) (amended by SI 1991/1876). The issue of such a summons must be noted immediately in the index of pending grant applications: Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(7) (substituted by SI 1998/1903). If the issue of such a summons is known to the district judge or registrar he must not allow any grant to be sealed until the summons is finally disposed of: Non-Contentious Probate Rules 1987, SI 1987/2024, r 27(8) (amended by SI 1991/1876). The Non-Contentious Probate Rules 1987, SI 1987/2024, r 27 (as amended) does not operate to prevent a grant being made to any person to whom a grant may or may be required to be made under any enactment: r 28(1). Rule 27 (as amended) also does not apply (except where probate is granted to an executor named, or according to the tenor (see PARA 118 ante), or where the whole estate in England and Wales consists of immovables and a grant is made limited to those (see PARA 252 post)) where the deceased died domiciled outside England and Wales: r 28(2). As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iii) Next of Kin/167. Joint grants.

167. Joint grants.

Where under a will¹ or intestacy any beneficiary is a minor or a life interest arises, any grant of administration² by the High Court must be made either to a trust corporation³ (with or without an individual), or to a consular officer of a foreign state⁴, or to not less than two individuals, unless it appears to the court to be expedient in all the circumstances to appoint an individual as sole administrator⁵. The purpose is to protect the interest of the minor or remainderman, and for this reason it seems that if after grant to one administrator the value of the estate is or becomes such that a previously unexpected minority or remainder arises the proper course is for him to apply for the appointment of a second administrator⁶. The court may appoint a single administrator where the estate is insolvent⁷, and where an administrator pending suit is appointed⁸.

If at any time during the minority of a beneficiary or the subsistence of a life interest under a will or intestacy there is only one personal representative (not being a trust corporation), the court may, on the application of any person interested or the guardian or receiver of any such person, and in accordance with probate rules⁹, appoint one or more additional personal representatives to act while the minority or life interest subsists and until the estate is fully administered¹⁰.

The appointment of such an additional personal representative does not have the effect of including him in any chain of representation¹¹.

1 For the meaning of 'will' see PARA 16 note 4 ante.

2 For the meaning of 'administration' see PARA 18 note 8 ante.

3 For the meaning of 'trust corporation' see PARA 18 note 4 ante.

4 See PARA 210 post.

5 Supreme Court Act 1981 s 114(2). As to the only circumstances in which a life interest arises see PARA 592 post. On an application for a grant of administration the oath supporting the grant (see PARA 195 post) must state whether any minority or life interest so arises and the court may act on such evidence: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 8(4); Supreme Court Act 1981 s 114(3). Where an applicant desires to be appointed as sole administrator, he should state in the oath to lead to the grant or in a separate affidavit the reasons for which the court is asked to make such a grant: *Practice Direction* [1982] 3 FLR 185.

6 As to the court's power to appoint an additional administrator see the text to note 10 infra. After administration is complete the same situation may arise, but in this case it is a simple matter to appoint an additional trustee.

7 See *Re Herbert* [1926] P 109. Cf *Re White* [1928] P 75, CA, and *Re Hall* [1950] P 156, [1950] 1 All ER 718, in which cases the correctness of the decision in *Re Herbert* supra was not directly in issue. As to grants to creditors see PARA 178 post.

8 See the Supreme Court Act 1981 s 117; and PARA 216 post. See also *Re Lindley, Lindley v Lindley* [1953] P 203, [1953] 2 All ER 319; *Re Haslip* [1958] 2 All ER 275n, [1958] 1 WLR 583.

9 Ie in accordance with the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended): see the Supreme Court Act 1981 s 114(4).

10 Ibid s 114(4). This provision does not apply where the existing personal representative is a consular officer of a foreign state appointed under the Consular Conventions Act 1949: see s 1(4) (as amended); and PARAS 119 ante, 210 post.

11 Supreme Court Act 1981 s 114(5). As to the chain of representation see PARA 47 et seq ante.

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72-268 The Grant of Probate or Administration

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iii) Next of Kin/168. Procedure.

168. Procedure.

The application to add a personal representative¹ must be made to a district judge² or registrar³ and must be supported by an affidavit by the applicant, the consent of the proposed additional personal representative and such other evidence as the district judge or registrar may require⁴. On the application the district judge or registrar may direct that a note be made on the original grant of the addition of a further personal representative, or he may impound or revoke the grant or make such other order as the circumstances of the case may require⁵.

A person entitled in priority to a grant of administration may, without leave, apply for a grant with a person entitled in a lower degree, provided that there is no other person entitled in a higher degree to the person to be joined, unless every other such person has renounced⁶. An application for leave to join with a person entitled in priority to a grant of administration a person having no right or no immediate right to a grant must be made to a district judge or registrar, and must be supported by an affidavit by the person entitled in priority, the consent of the person proposed to be joined as administrator and such other evidence as the district judge or registrar may direct⁷. Unless a district judge or registrar otherwise directs, there may, without any such application, be joined with a person entitled in priority to administration⁸ any nominated person⁹ or a trust corporation¹⁰.

1 Ie under the Supreme Court Act 1981 s 114(4) (see PARA 167 ante): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 26(1) (as amended: see note 4 infra).

2 For the meaning of 'district judge' see PARA 27 note 6 ante.

3 For the meaning of 'registrar' see PARA 27 note 7 ante.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 26(1) (r 26 amended by SI 1991/1876).

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 26(2) (as amended: see note 4 supra).

6 Ibid r 25(1). Rule 25 (as amended) does not operate to prevent a grant being made to any person to whom a grant may or may be required to be made under any enactment: r 28(1). Rule 25 (as amended) also does not apply (except where probate is granted to an executor named, or according to the tenor (see PARA 118 ante), or where the whole estate in England and Wales consists of immovables and a grant is made limited to those (see PARA 252 post)) where the deceased died domiciled outside England and Wales: r 28(2).

7 Ibid r 25(2) (r 25(2), (3) amended by SI 1991/1876).

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 25(3) (as amended: see note 7 supra). As to the order of priority see PARA 158 ante.

9 Ibid r 25(3)(a). A person is nominated under r 32(3) (as amended) (see PARA 203 post) or r 35(3) (as amended) (see PARA 213 post): see r 25(3)(a).

10 Ibid r 25(3)(b). For the meaning of 'trust corporation' see PARA 18 note 4 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iii) Next of Kin/169. Interest causes.

169. Interest causes.

Where there is a dispute as to who is in fact the next of kin of an intestate, the question is tried in an action known as an interest cause, the practice in which is similar to that in actions for proving a will in solemn form. Each party is at liberty to deny the interest of the other, and both parties may, with the permission of the judge, adduce proof at one and the same trial of their respective interests¹. Where the interest by virtue of which the claim to be entitled to a grant is disputed, the statement of case of each party must show that if the allegations made in it are proved he would be entitled to the interest he claims². The unsuccessful party in an interest suit is ordered to pay the costs unless the circumstances are exceptional³.

1 See *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 9.1; and PARA 284 post. As to the CPR see PARA 37 note 3 ante. The decision in an interest suit may involve an issue of pedigree or of legitimacy but a prayer for a declaration of legitimacy can only be made by petition and not in probate proceedings: *Warter v Warter* (1890) 15 PD 35. See also the Family Law Act 1986 s 56 (as substituted); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 122.

2 See *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 9.2; and PARA 284 post.

3 *Wiseman v Wiseman* (1866) LR 1 P & D 351.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

169 Interest causes

NOTES 1, 2--*Practice Direction--Contentious Probate Proceedings* (1999) PD 49A revoked. As to the procedure relating to probate claims generally see now CPR Pt 57 (added by SI 2001/1388); and *Practice Direction--Probate* (2001) PD 57.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iv) The Crown and the Duchies/170. The Crown's right.

(iv) The Crown and the Duchies

170. The Crown's right.

Where a person dies intestate after 31 December 1925 leaving no person entitled to share in his estate under the provisions relating to distribution on intestacy¹, the intestate's residuary estate belongs to the Crown² as bona vacantia in lieu of any right to escheat³. Administration is granted to the Treasury Solicitor⁴ on behalf of the Crown⁵. The administrator's duty is to get in the estate, pay the debts and account for the balance to the use of the Crown⁶. In the case of partial intestacy only, the Treasury Solicitor is entitled, not to a general grant, but to a grant limited to the property undisposed of by the will⁷. Where administration was decreed to the Crown but not taken out, a creditor was allowed to come in and take a grant⁸. In any case in which it appears that the Crown is or may be beneficially interested in the estate of a deceased person, notice of intended application for a grant must be given by the applicant to the Treasury Solicitor, and the district judge or registrar may direct that no grant is to issue within 28 days after the notice has been given⁹.

1 As to intestacy see PARA 583 et seq post. As to deaths on or after 1 January 1953 see PARA 591 et seq post; and as to deaths on or after 1 January 1926 but before 1 January 1953 see PARA 621 et seq post.

2 Alternatively the intestate's residuary estate belongs to the Duchy of Lancaster or the Duke of Cornwall, as the case may be: see PARA 174 post.

3 Administration of Estates Act 1925 s 46(1)(vi). See PARAS 613-614, 627 post. As to the rights of a foreign state in the case of a foreigner dying abroad see PARA 614 post. As to escheat and bona vacantia see CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq.

4 For the meaning of 'Treasury Solicitor' see PARA 159 note 1 ante. As to grants to the Treasury Solicitor see PARA 171 post. As to the Treasury Solicitor generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

5 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(2); and PARA 159 ante. For the meaning of 'the Crown' see PARA 159 note 2 ante.

6 *Megit v Johnson* (1780) 2 Doug KB 542. See also *R v Sutton* (1670) 1 Wms Saund 271b note 1.

7 *Re Rhoades*(1866) LR 1 P & D 119. However, in *Jones v Treasury Solicitor* (1932) 48 TLR 615; affd 49 TLR 75, CA, the court made a general grant of administration to the Treasury Solicitor with the will annexed. This point does not appear to have been taken.

8 *Re Steinorth* (1856) Dea & Sw 270. See also *Re Ball* (1902) 47 Sol Jo 129.

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 38 (amended by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iv) The Crown and the Duchies/171. Grant to the Treasury Solicitor.

171. Grant to the Treasury Solicitor.

The Treasury Solicitor¹ deals with the property in accordance with certain statutory provisions and rules². He is not required to deliver any affidavit, statutory declaration, account, certificate or other statement verified on oath; in lieu of this he delivers a signed account or particulars of the estate of the deceased³. Upon any change in the holder of the office, the letters of administration, with all their incidents, vest in the Treasury Solicitor for the time being without further grant⁴. The court has power to revoke the grant⁵.

1 As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

2 See the Treasury Solicitor Act 1876 s 4 (amended by the Statute Law Revision Act 1963); the Treasury Solicitor Act 1876 s 5 (amended by the Statute Law (Repeals) Act 1986); the Administration of Estates Act 1925 s 30(4) (amended by the Statute Law (Repeals) Act 1981); and the Treasury Solicitor (Crown's Nominee) Rules 1997, SI 1997/2870. The Treasury Solicitor maintains with the Paymaster General at the Bank of England the Crown's Nominee Account into which all moneys received by or vested in the Treasury Solicitor under any administration are paid: r 3(1); Treasury Solicitor Act 1876 s 4(1). All sums payable by the Treasury Solicitor are to be paid out of this account by authorised orders of the Paymaster General: Treasury Solicitor (Crown's Nominee) Rules 1997, SI 1997/2870, r 3(2).

3 Administration of Estates Act 1925 s 30(3) (amended by the Administration of Justice Act 1970 s 54(3), Sch 11).

4 See the Treasury Solicitor Act 1876 s 2.

5 See *ibid* s 2.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iv) The Crown and the Duchies/172. Proceedings against the Treasury Solicitor.

172. Proceedings against the Treasury Solicitor.

Where the administration of the real and personal estate of any deceased person has been granted to the Treasury Solicitor¹ proceedings by or against him for the recovery of the real or personal estate or any part or share of it are of the same character and are instituted and carried on in the same manner and are subject to the same rules of law and equity (including in general the rules of limitation under the statutes of limitation² or otherwise) as if the administration had been granted to him as one of the persons interested in the deceased's estate³.

Accordingly, if the Treasury Solicitor hands over assets of the intestate to the Crown, and next of kin subsequently establish their claim in time, he must account for the assets so parted with, together with interest⁴. If the monarch to whom the property is handed over is dead before the claim is established, the next of kin's right is against his successor⁵.

1 See PARA 171 ante. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

2 See especially the Limitation Act 1980; and LIMITATION PERIODS.

3 Administration of Estates Act 1925 s 30(1). Proceedings by or against the Crown in respect of real and personal estate are not to be instituted except subject to the same rules of law and equity subject to which a proceeding for the like purposes might be instituted by or against a subject: s 30(2). As to the periods of limitation applicable to actions claiming the real or personal estate of a deceased person, and for special provisions relating to the recovery of trust property see LIMITATION PERIODS vol 68 (2008) PARA 1034 et seq. As to the application of the Limitation Act 1980 to proceedings by or against the Crown see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 105; LIMITATION PERIODS vol 68 (2008) PARA 903. As to proceedings by or against the Crown generally see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 107 et seq. The Crown does not take an intestate's estate as trustee where it has been found that there are no next of kin: *Re Mason* [1929] 1 Ch 1, CA; *Re Blake, Re Minahan's Petition of Right* [1932] 1 Ch 54. See also *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; on appeal sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

4 *A-G v Köhler* (1861) 9 HL Cas 654; *Partington v A-G* (1869) LR 4 HL 100; *Re Dewell, Edgar v Reynolds* (1858) 4 Drew 269. Where executors under an order in an action had paid certain personal estate to the Treasury Solicitor, who had not taken out administration, the Crown was not charged with interest: *Re Gosman* (1881) 17 ChD 771, CA.

5 *Re Mason* [1928] Ch 385 (affd on another point [1929] 1 Ch 1, CA), not following dicta in *A-G v Köhler* (1861) 9 HL Cas 654 at 672.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iv) The Crown and the Duchies/173. Proceedings against executor who hands property to the Crown.

173. Proceedings against executor who hands property to the Crown.

Where an estate is administered by an executor or administrator who hands over the balance to the Crown because he cannot discover any next of kin to the deceased, the next of kin are entitled to treat this as a breach of trust, and to proceed against him and make him responsible, but their right is against the executor or administrator personally, and not against the Treasury Solicitor unless the latter makes himself personally responsible¹.

¹ See *Re Mason* [1928] Ch 385 at 399; affd [1939] 1 Ch 1, CA; *A-G v Köhler* (1861) 9 HL Cas 654 at 672. As to grants to and actions against the Treasury Solicitor see PARAS 171-172 ante. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(iv) The Crown and the Duchies/174. Grant to solicitors of the duchies of Lancaster and Cornwall.

174. Grant to solicitors of the duchies of Lancaster and Cornwall.

The duchies' right¹ to a grant was originally confined to bona vacantia situate within the duchy², but was extended in 1926 to the intestate's residuary estate as bona vacantia and in lieu of any right to escheat³, but there is no provision entitling the duchies to property outside the confines of the duchy, whether real or personal, of an intestate dying resident within the duchy⁴. In such a case (and where the converse applies), separate grants to the Treasury Solicitor and to the solicitor to the duchy would be appropriate, but the need for this is in practice obviated by agreement between the authorities in question⁵.

The solicitor for the affairs of the Duchy of Lancaster⁶, when applying for or obtaining administration of the estate of a deceased person, is not required to deliver any affidavit, statutory declaration, account, certificate or other statement verified on oath; in lieu of this he delivers a signed account or particulars of the estate of the deceased⁷. Upon any change in the holder of the office, the letters of administration, with all their incidents, vest in the Duchy solicitor for the time being without further grant⁸. The court has power to revoke the grant⁹.

The solicitor of the Duchy of Cornwall is not exempted on applying for or obtaining administration from the requirement to deliver an affidavit, statutory declaration, account, certificate or other statement verified on oath as are the Treasury Solicitor and the solicitor for the affairs of the Duchy of Lancaster¹⁰. A new grant is required when the office of solicitor to the Duchy of Cornwall becomes vacant because he is not a corporation sole¹¹.

1 In the Non-Contentious Probate Rules 1987, SI 1987/2024, 'the Crown' includes the Crown in right of the Duchy of Lancaster and the Duke of Cornwall, and 'the Treasury Solicitor' includes the solicitor for the affairs of the Duchy of Lancaster and the solicitor of the Duchy of Cornwall: see r 2(1); and PARA 159 notes 1-2 ante. In the Administration of Estates Act 1925, 'the Treasury Solicitor' includes only the solicitor for the affairs of the Duchy of Lancaster: see s 55(1)(xxv); and PARA 159 note 1 ante. As to the Duchy of Lancaster see CROWN PROPERTY vol 12(1) (Reissue) PARA 300 et seq; and as to the Duchy of Cornwall see CROWN PROPERTY vol 12(1) (Reissue) PARA 318 et seq. As to grants to and actions against the Treasury Solicitor see PARAS 171-172 ante.

2 The analogy is with the foreshore, felons' goods and treasure trove: *Dyke v Walford* (1846) 5 Moo PCC 434 at 480-481. As to bona vacantia see CROWN PROPERTY vol 12(1) (Reissue) PARA 235 et seq.

3 Administration of Estates Act 1925 s 46(1)(vi). See also PARA 613 post; and CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq.

4 It is doubtful whether the concept of 'domicile' may be applied to any unit less than a sovereign state: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

5 Such agreement also covers the case of duchy manors lying outside the confines of Cornwall, which are nevertheless strictly part of the duchy of Cornwall: see CROWN PROPERTY vol 12(1) (Reissue) PARA 331.

6 See the Duchy of Lancaster Act 1920 s 3(3); and the Administration of Estates Act 1925 s 30(4) (both amended by the Statute Law (Repeals) Act 1981). See also note 1 supra.

7 See the Administration of Estates Act 1925 ss 30(3), 55(1)(xxv) (s 30(3) amended by the Administration of Justice Act 1970 s 54(3), Sch 11).

8 See the Treasury Solicitor Act 1876 s 2; applied by the Duchy of Lancaster Act 1920 s 3(3) (as amended: see note 6 supra).

9 See the Treasury Solicitor Act 1876 s 2; applied by the Duchy of Lancaster Act 1920 s 3(3) (as amended: see note 6 supra).

10 In the Administration of Justice Act 1925, the solicitor to the Duchy of Cornwall is not included in the definition of 'Treasury Solicitor': see note 1 supra.

11 See Ing's Bona Vacantia 26.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(v) Trust Corporations and Public Trustee/175. Grants to trust corporations.

(v) Trust Corporations and Public Trustee

175. Grants to trust corporations.

An application for a grant¹ to a trust corporation² must be made through one of its officers, who must depose in the oath³ that the corporation is a statutory trust corporation⁴ and that it has power to accept a grant⁵. Where the trust corporation is the holder of an official position⁶, any officer whose name is included on a list filed with the senior district judge⁷ of persons authorised to make affidavits and sign documents on behalf of the office holder may act as the officer through whom the holder of that official position applies for the grant⁸. In all other cases a certified copy of the resolution of the trust corporation authorising the officer to make the application must be lodged, or it must be deposed in the oath that such certified copy has been filed with the senior district judge, that the officer is identified in it by the position he holds, and that such resolution is still in force⁹.

Where a trust corporation applies for a grant of administration otherwise than as a beneficiary or the attorney of some person, the consents of all persons entitled to a grant and of all persons interested in the deceased's residuary estate must be lodged with the application, unless the district judge¹⁰ or registrar¹¹ directs that these consents be dispensed with on such terms, if any, as he thinks fit¹².

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 For the meaning of 'trust corporation' see PARA 18 note 4 ante. As to corporations other than trust corporations see PARA 18 ante.

3 For the meaning of 'oath' see PARA 128 note 2 ante.

4 I.e. a trust corporation within the meaning of the Supreme Court Act 1981 s 128 (as extended by the Law of Property (Amendment) Act 1926) (see PARA 18 note 4 ante): see the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 2(1), 36(1).

5 Ibid r 36(1). Where a trust corporation has been appointed as executor on terms and conditions specifically referred to as being in existence at the date of the will or of its republication as the case may be, provided that the oath contains a statement to the effect that nothing in these terms or conditions limits the corporation's power to take a full grant, it will not normally be necessary to produce them on the application: *Practice Direction*[1981] 2 All ER 1104. It is not necessary for the oath or grant to account for any change, following re-registration under the Companies Act 1980, in the suffix to the name of the corporation, and evidence will not normally be required that the corporation has registered or re-registered under that Act: *Practice Direction*[1982] 1 All ER 384, [1982] 1 WLR 214.

6 For examples of official positions see PARA 18 ante.

7 For the meaning of 'senior district judge' see PARA 87 note 2 ante.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 36(2)(a) (r 36(2) amended by SI 1991/1876).

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 36(2)(b) (as amended: see note 8 supra). See also PARA 18 ante.

10 For the meaning of 'district judge' see PARA 27 note 6 ante.

11 For the meaning of 'registrar' see PARA 27 note 7 ante.

12 Non-Contentious Probate Rules 1987, SI 1987/2024, r 36(3) (amended by SI 1991/1876).

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72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(v) Trust Corporations and Public Trustee/176. Grants to the Public Trustee.

176. Grants to the Public Trustee.

The Public Trustee¹ is equally entitled with any other person or class of persons to a grant of administration, whether general, or with the will annexed, or limited as to time or otherwise², but as between the Public Trustee and the surviving spouse or next of kin of the deceased, the latter are to be preferred, unless for good cause shown to the contrary³. The consent or citation of the Public Trustee is not required for the grant to any other person⁴. The Public Trustee is not required to give security⁵.

The Public Trustee is entitled to apply for administration as a trust corporation⁶, and may act as attorney for any person where the execution of any trust is involved⁷. Any executor or administrator who has obtained a grant of probate or letters of administration may, with the sanction of the court, transfer his powers to the Public Trustee⁸.

1 The Public Trustee is a corporation sole with perpetual succession and an official seal, constituted by the Public Trustee Act 1906 s 1(2): see TRUSTS vol 48 (2007 Reissue) PARA 767. In the wording of the grant the 'Public Trustee' should be so described. When the Public Trustee applies he must clear off executors in the usual manner and give notice to the residuary legatees and devisees or their representatives or to other persons entitled in priority: Instruction by Sir Gorell Barnes P, 27 March 1908. As to the Public Trustee generally see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq.

2 See the Public Trustee Act 1906 ss 6(1), 15; and TRUSTS vol 48 (2007 Reissue) PARA 771. The Public Trustee is authorised to accept probate of letters of administration of any kind: see the Public Trustee Rules 1912, SR & O 1912/348, r 6(c); and TRUSTS vol 48 (2007 Reissue) PARA 771.

3 See the Public Trustee Act 1906 s 6(1); and TRUSTS vol 48 (2007 Reissue) PARA 771.

4 See *ibid* s 6(1); and TRUSTS vol 48 (2007 Reissue) PARA 771.

5 See *ibid* s 11(4) (amended by the Administration of Estates Act 1971 s 12(2), (4), Sch 2 Pt II). He is subject, however, to the same liabilities and duties as if he had given security: see the Public Trustee Act 1906 s 11(4) (as so amended).

6 See the Supreme Court Act 1981 s 128; and PARAS 18, 175 ante.

7 See the Public Trustee Rules 1912, SR & O 1912/348, r 6(b); and TRUSTS vol 48 (2007 Reissue) PARA 769.

8 See the Public Trustee Act 1906 s 6(2); and TRUSTS vol 48 (2007 Reissue) PARA 771.

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72-268 The Grant of Probate or Administration

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(v) Trust Corporations and Public Trustee/177. Limitation of Public Trustee's powers.

177. Limitation of Public Trustee's powers.

It is generally accepted that the Public Trustee cannot act as executor of a person domiciled abroad except in respect of a will of English land¹. As regards his power to act as trustee the test is whether the trust is by declaration or implication an English trust².

Grants of administration have been made by order of the court, particularly in time of war, limited to collecting and preserving an estate; and also under the court's discretionary power³, with wider powers; but in practice the Public Trustee is seldom willing to take a grant of representation where the deceased has died domiciled out of England⁴.

1 As to the Public Trustee generally see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

2 *Re Hewitt's Settlement, Hewitt v Hewitt* [1915] 1 Ch 228, where it was held that the Public Trustee has no power to accept the trusteeship of a foreign settlement. See also the Recognition of Trusts Act 1987; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 424 et seq.

3 See PARA 180 post.

4 See Tristram and Coote's Probate Practice (28th Edn) 335.

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72-268 The Grant of Probate or Administration

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As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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(vi) Creditors

178. Creditor's right to grant.

If all persons entitled to a grant in priority¹ have been cleared off, a grant may be made to a creditor². A creditor can only obtain a grant on the renunciation of the Treasury Solicitor³.

Where there is a minority or a life interest, the grant must be made either to a trust corporation, with an individual, or to not less than two individuals⁴, unless the estate is insolvent or the grant is made pending suit⁵.

A creditor may be preferred to persons entitled to share in the estate by reason of insolvency or other special circumstances⁶.

1 As to the order of priority see PARAS 158-159 ante. See also PARA 196 post.

2 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(3); and PARA 159 ante. See also PARA 198 post. Such a grant may be revoked if the creditor failed to make full disclosure of matters material to his application for a grant: see *Shephard v Wheeler* (2000) Times, 15 February.

3 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(2), (3); and PARA 159 ante. See also *Re Heerman* [1910] P 357. As to grants to the Treasury Solicitor see PARA 171 ante.

4 See the Supreme Court Act 1981 s 114(2); and PARA 167 ante. As to grants to corporations see PARAS 18, 175 ante, 221 post.

5 As to these two exceptions or possible exceptions see PARA 167 ante. As to insolvent estates generally see PARA 399 et seq post.

6 See the Supreme Court Act 1981 s 116(1); and PARA 180 post.

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72-268 The Grant of Probate or Administration

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As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(vi) Creditors/179. Meaning of 'creditor'.

179. Meaning of 'creditor'.

For the purpose of obtaining a grant a secured creditor¹, a surety who has paid off his deceased principal's debt² and the personal representative of a deceased creditor³ are creditors. A creditor whose debt is statute-barred may have a grant⁴. It is not the practice to make a grant to a purchaser of a debt after the death⁵, but a grant may be made to the trustee in bankruptcy of a creditor⁶, or to the assignee of the trustee⁷, or to the person who has paid the intestate's funeral expenses⁸. In a proper case an undertaker who pays expenses may take a grant as creditor⁹, although he is not normally regarded as a creditor of the deceased¹⁰.

1 *Roxburgh v Lambert* (1829) 2 Hag Ecc 557; *Re Godfrey* (1861) 2 Sw & Tr 133; *Re Lowe* (1898) 78 LT 566. As to a grant to a nominee of a company as creditor in respect of unpaid calls on shares see COMPANIES vol 15 (2009) PARA 1145.

2 *Williams v Jukes* (1864) 34 LJPM & A 60.

3 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(4); and PARA 159 ante. See, however, PARAS 158 ante, 198 post.

4 *Coombs v Coombs* (1866) LR 1 P & D 288. See also LIMITATION PERIODS vol 68 (2008) PARA 942.

5 *Baynes v Harrison* (1856) Dea & Sw 15; *Day v Thompson*, *Re Frampton* (1863) 3 Sw & Tr 169; *Re Coles*, *Macninch v Coles* (1863) 3 Sw & Tr 181. Cf *Re Cosh* (1909) 25 TLR 785.

6 *Downward v Dickinson*, *Re Chune* (1864) 3 Sw & Tr 564.

7 *Re Burdett* (1876) 1 PD 427.

8 *Newcombe v Beloe* (1867) LR 1 P & D 314; *Re Percy*, *Fairland v Percy* (1875) LR 3 P & D 217 at 222; *Re Fowler* (1852) 16 Jur 894.

9 See note 8 supra.

10 It seems that an undertaker is strictly a creditor of the personal representatives in their capacity as such and is therefore in a different position from a creditor to whom the deceased owed a debt in his lifetime.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(vii) Discretionary Grants/180. Court's discretionary power.

(vii) Discretionary Grants

180. Court's discretionary power.

If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would in accordance with probate rules¹ have been entitled to a grant², the court may in its discretion appoint as administrator such person as it thinks expedient³. Any such grant of administration⁴ may be limited in any way the court thinks fit⁵.

An application for an order for a grant of administration under the court's discretionary power may be made to a district judge⁶ or registrar⁷, supported by an affidavit setting out the grounds of the application⁸.

1 In the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended): see the Supreme Court Act 1981 s 116(1).

2 For the meaning of 'grant' see PARA 79 note 2 ante.

3 Supreme Court Act 1981 s 116(1).

4 For the meaning of 'administration' see PARA 18 note 8 ante.

5 Supreme Court Act 1981 s 116(2). See also *Re Mathew*[1984] 2 All ER 396, [1984] 1 WLR 1011 (grant with reservation of power of executors to apply for probate).

6 For the meaning of 'district judge' see PARA 27 note 6 ante.

7 For the meaning of 'registrar' see PARA 27 note 7 ante.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 52(a) (amended by SI 1991/1876). Full disclosure of matters which may be material to the application should be given: see *Shephard v Wheeler*(2000) Times, 15 February. As to the unsuitability of the non-contentious probate procedure on an application which is likely to be contentious and involve a proliferation of evidence see *Van Hoorn v Van Hoorn* (1978) 123 Sol Jo 65.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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181. Special circumstances.

No broad rule of law can be laid down as to what are special circumstances enabling the court to pass over a person otherwise entitled to a grant¹; each case must be decided upon its own merits². One object which the court keeps in view is the expeditious and economical administration of estates of deceased persons³. Special circumstances are not necessarily limited to circumstances in connection with the estate itself or its administration, but can be any other circumstances which make it necessary or expedient to pass over the executor⁴. The mere fact that the next of kin are desirous that the court should make a grant to a nominee, who is a stranger to the estate, is not necessarily regarded as a special circumstance⁵. Where there is a doubt as to the persons claiming as next of kin, and those interested on intestacy are aged and infirm, the court may give effect to an arrangement entered into between the parties that the grant be made to a stranger⁶. The court has also made a joint grant to the next of kin and a person not next of kin, but entitled in distribution⁷. The court may also make a general grant to a receiver appointed by the Chancery Division to get in the intestate's estate⁸.

1 As to the court's discretionary power see PARA 180 ante.

2 *Re Chapman* [1903] P 192. See also *Re Stewart (or Stuart)* (1875) LR 3 P & D 244 (will by which a minor was sole beneficiary and was appointed sole executrix, but trustees were appointed for her until she came of age; administration with will annexed granted to trustees until she was of age); *Re Crippen* [1911] P 108 (personal representative of murderer of wife passed over on grant of wife's estate); *Re Byrne* (1910) 44 ILT 98 (grant of estate of deceased employer to nominee of injured workman for purpose of a claim for damages); *Re Hall, Hall v Knight and Baxter* [1914] P 1, CA; *Re Drawmer* (1913) 108 LT 732; *Re S* [1968] P 302, [1967] 2 All ER 150 (both cases where executor in prison passed over); *Re Bowron* (1914) 84 LJP 92 (grant to husband's trustee in bankruptcy; husband not cited); *Re Woolf* (1918) 34 TLR 477 (intestate's son preferred to daughters who had married alien enemies); *Re Ray* (1926) 96 LJP 37 (trust for minor; executor who was unfit and had adverse interest passed over); *Re Potticary* [1927] P 202 (misfeasance of executor); *Re Morgans* (1931) 145 LT 392 (grant to nominees of next of kin who were unable to agree on any one or more of themselves administering the estate); *Re Leguia* [1934] P 80 (grant to creditor on executor and next of kin abstaining from taking a grant where estate was insolvent; but cf the later proceedings by the executor whose citation had been dispensed with (*Re Leguia* (1936) 105 LJP 72)); *Re Simpson* [1936] P 40 (nominee of plaintiff in an action against the estate appointed in lieu of the persons entitled upon the refusal of the latter); *Re Parnall* [1936] P 47 (refusal of persons entitled); *Re Knight* [1939] 3 All ER 928; *Practice Direction* [1965] 1 All ER 923, [1965] 1 WLR 552 (where appropriate, a grant of administration to the estate of a solicitor in practice on his own may be granted

to nominees of the Law Society); *Re Biggs* [1966] P 118, [1966] 1 All ER 358 (grant to next of kin passing over an executor who had intermeddled but refused to prove the will); *Re Newsham* [1967] P 230, [1966] 3 All ER 681 (grant passing over widow so as not to prejudice an insurance claim); *Re Clore* [1982] Fam 113, [1982] 2 WLR 314 (approved in *IRC v Stype Investments (Jersey) Ltd*, *Re Clore* [1982] Ch 456, [1982] 3 All ER 419, CA) (where executors were passed over who had shared responsibility for removing assets from the jurisdiction and opposing the payment of tax found due on the estate). As to the appointment of criminals as executors see PARA 15 ante. As to grants to the Public Trustee by order or discretion of the court see PARA 177 ante.

Grants have been made in favour of public authorities or their nominees where public expense has been incurred on behalf of poor persons: see eg *Re Hockin* (1895) 73 LT 316; *Re Everley* [1892] P 50; *Re Sharland* (1892) 67 LT 501 (grants to poor law guardians under the Court of Probate Act 1857 s 73 (repealed)). As to the general effect of bankruptcy see PARAS 20, 166 ante.

3 *Re Grundy* (1868) LR 1 P & D 459.

4 *Re Clore* [1982] Fam 113 at 117, [1982] 2 WLR 314 at 318 per Ewbank J (approved in *IRC v Stype Investments (Jersey) Ltd*, *Re Clore* [1982] Ch 456, [1982] 3 All ER 419, CA); *Buchanan v Milton* [1999] 2 FLR 844. See, however, *Re Edwards-Taylor* [1951] P 24, [1950] 2 All ER 446.

5 *Re Richardson* (1871) LR 2 P & D 244; *Teague and Ashdown v Wharton* (1871) LR 2 P & D 360; *Re Hale* (1874) LR 3 P & D 207; *Re Brotherton* [1901] P 139. See, however, *Re Morgans* (1931) 145 LT 392. As to passing over by consent see PARA 182 post.

6 *Re Hopkins* (1875) LR 3 P & D 235. See also *Re Potter, Potter v Potter* [1899] P 265, where the object in procuring the grant to a stranger was to put an end to litigation between the parties. In the following cases the court considered the circumstances sufficient to justify a special grant to a stranger: *Re Johnson* (1862) 2 Sw & Tr 595; *Re Minshull* (1889) 14 PD 151; *Re Jackson* [1892] P 257; *Re Trigg* [1901] P 42; *Re Barton* [1898] P 11.

7 *Re Grundy* (1868) LR 1 P & D 459; *Re Walsh* [1892] P 230. See also PARA 168 ante.

8 *Re Mayer* (1873) LR 3 P & D 39; *Re Moore* [1892] P 145. As to the appointment of a receiver see PARA 218 post. As to receivers generally see RECEIVERS.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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182. Passing over by consent.

Although there is authority to the contrary¹, in practice grants are now made to persons not primarily or at all entitled, with the consent of the persons being passed over. Accordingly, where by reason of ill-health an executor is incapable of attending to business or of taking out probate, a grant of administration with the will annexed may be made to his nominee for his use and benefit². Other instances are the grant to a nominee of the Law Society to enable a

solicitor's practice to be continued³, the grant by agreement to a doubtful claimant⁴, and the grant to a nominee with no interest in the estate on the agreement of all the persons interested⁵.

1 See *Teague and Ashdown v Wharton* (1871) LR 2 P & D 360; and PARA 181 note 5 ante.

2 *Re Davis* [1906] P 330; *Re Roberts* (1858) 1 Sw & Tr 64. As to administration with the will annexed see PARA 196 et seq post.

3 See *Practice Direction* [1965] 1 All ER 923, [1965] 1 WLR 552.

4 *Re Minshull* (1889) 14 PD 151 (kinship doubtful; agreement between claimants).

5 *Re Potter, Potter v Potter* [1899] P 265 (auditor of the deceased's accounts appointed); *Re Mathew* [1984] 2 All ER 396, [1984] 1 WLR 1011 (grant to nominees of next of kin who were unable to agree on administration of estate).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(vii) Discretionary Grants/183. Person with prior right presumed dead.

183. Person with prior right presumed dead.

Where the person who would, if living, be entitled to the grant¹ has been missing for many years, the court may make a grant upon the footing that he is dead, without requiring him to be cited by advertisement², but where such person would if alive have a life interest in the estate, a joint grant is necessary³.

Where the question of the person entitled to the grant depends upon the date of death of a person presumed to have died, the court solves the difficulty by making a grant under its discretionary powers⁴. The court will not under this power make a grant to a person entitled in another capacity⁵.

1 As to the order of priority see PARA 158 ante.

2 *Re Reed* (1874) 29 LT 932; *Re Callicott* [1899] P 189; *Re Love* (1901) 17 TLR 721; *Re Chapman* [1903] P 192. It would appear to be sufficient for the applicant to swear to his belief that the absent party is dead (see *Re Chapman* supra), although the practice is stated to be unsettled: see *Re Jackson* (1902) 87 LT 747, in which case *Re Reed* supra and *Re Pridham* (1889) 61 LT 302 were considered. Corroborative evidence of the death may be dispensed with: *Re Bowden* (1904) 21 TLR 13. See also *Re Rishton* (1921) 90 LJP 374 (usual affidavits by

relatives dispensed with and the court followed an order of the county court which had investigated the question of presumption of death).

3 *Re Hall* [1950] P 156, [1950] 1 All ER 718.

4 *Re Peck* (1860) 2 Sw & Tr 506; *Re Harling* [1900] P 59; *Re Parnall* [1936] P 47. As to the court's discretionary power see also PARAS 180-181 ante.

5 *Re Fairweather* (1862) 2 Sw & Tr 588; *Re Smith* (1858) 27 LJP & M 105, where the applicant was only entitled to a limited grant in another capacity.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(vii) Discretionary Grants/184. Trust estates.

184. Trust estates.

A grant may be made under the court's discretionary power on the application of a beneficiary under a trust of which the deceased was sole surviving trustee¹. Such a grant will generally be limited to the trust property².

1 See generally TRUSTS.

2 The grant is normally made both under the Supreme Court Act 1981 s 113 (see PARA 12 ante), and under s 116 (see PARA 180 ante): see PARA 227 post. As to the devolution of trust property where there is a duly constituted personal representative see PARA 368 et seq post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act

1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(vii) Discretionary Grants/185. Notice to parties of discretionary grant.

185. Notice to parties of discretionary grant.

Before making a grant under its discretionary jurisdiction, the court usually requires notice to be given to the parties having a claim to the grant, but it will in special circumstances make the grant without such notice¹.

UPDATE

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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(viii) Estates Exempt from Necessity for Grant

186. The monarch.

There is no jurisdiction to make a grant in respect of the estate of a deceased British monarch¹, for to do so would be to contradict the principle of sovereignty and would in substance amount to an impleading of the reigning monarch².

¹ *Re King George III* (1862) 3 Sw & Tr 199.

² *Re King George III* (1822) 1 Add 255; 4 Co Inst 335; 1 Bl Com (14th Edn) 242 et seq. As to sovereignty see generally CROWN AND ROYAL FAMILY vol 12(1) (Reissue) PARA 4 et seq.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(viii) Estates Exempt from Necessity for Grant/187. Miscellaneous statutory exemptions from necessity for grant.

187. Miscellaneous statutory exemptions from necessity for grant.

In a number of cases provision is made by various enactments¹ authorising the payment of small sums and the disposition of personal effects and investments of small value to persons entitled to them without the necessity of obtaining a grant of probate or administration².

1 The enactments and instruments are those listed in the Administration of Estates (Small Payments) Act 1965 s 1, Sch 1 (as amended), of which: (1) those listed in Sch Pt I (as amended) are enactments authorising the disposal of property on death, without the necessity for probate or other proof of title, to persons appearing to be beneficially entitled to it, to relatives or dependants of the deceased or to other persons described in the enactments, but subject to a limit which is in most cases £100 and which does not in any case exceed £100; (2) those listed in Sch 1 Pt II (as amended) are enactments giving power to make rules or regulations containing corresponding provisions subject to a limit of £100; and (3) those listed in Sch 1 Pt III (as amended) are such rules and regulations as aforesaid and instruments containing corresponding provisions made under other enactments and containing a limit which does not in any case exceed £200: s 1(1), Sch 1 (amended by the Teachers' Superannuation Act 1965 ss 2(1)(c), 8(1), Sch 3 Pt II; the Trustee Savings Banks Act 1969 s 96(1), Sch 3 Pt I; the Merchant Shipping Act 1970 s 100(3), Sch 5; the Industrial Relations Act 1971 s 169, Sch 9; the National Savings Bank Act 1969, s 28(1), Sch 2; the Friendly Societies Act 1974 s 116(4), Sch 11; the Statute Law (Repeals) Act 1977; the Building Societies Act 1986 s 120(2), Sch 19 Pt I; the Statute Law (Repeals) Act 1993; and the Statute Law (Repeals) Act 1998).

For the provisions referred to see PARAS 188-190 post.

2 In the case of deaths on or after 11 May 1984, the limit, subject to the provisions of Administration of Estates (Small Payments) Act 1965 Sch 1 (as amended), is in each case £5,000 instead of the limit specified in the enactment or instrument (see note 1 supra); and for references to the said limits in those enactments and instruments there is accordingly substituted references to £5,000: s 1(1) (amended by the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539, art 2(a)).

In addition, in the enactments and instrument listed in the Administration of Estates (Small Payments) Act 1965 s 2, Sch 2 (as amended) (which enable a person by nomination to dispose of property on his death up to a limit of £100 or, in some cases, £200) the said limit, subject to the provisions of Sch 2 (as amended), in each case is £5,000 instead of the limit specified in the enactments or instrument; and for references to the said limits in the said enactments and instrument there accordingly is substituted references to £5,000: s 2 (amended by the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539, art 2(a)), Administration of Estates (Small Payments) Act 1965 Sch 2 (amended by the Friendly Societies Act 1974 s 116(4), Sch 11; and by the Statute Law (Repeals) Act 1993).

The Treasury may from time to time by order direct that the Administration of Estates (Small Payments) Act 1965 ss 1, 2 (both as amended), so far as they relate to any enactment have effect as if there were substituted

references to such higher amount as may be specified in the order: see s 6(1)(a). Any order under s 6 (as amended) applies in relation to deaths occurring after the expiration of a period of one month beginning with the date on which the order comes into force: see s 6(2). Any such order may be revoked by a subsequent order and must be made by statutory instrument; and no such order may be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament: s 6(4).

The Treasury may amend or repeal other corresponding or superseded enactments: see s 5 (amended by the National Debt Act 1972 s 6(3); the Friendly Societies Act 1974 s 116(1), Sch 9 para 19; and the Trustee Savings Banks Act 1985 ss 4(3), 7(3), Sch 4). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

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72-268 The Grant of Probate or Administration

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(viii) Estates Exempt from Necessity for Grant/188. Personal effects and pensions.

188. Personal effects and pensions.

Payments and dispositions may be made without obtaining a grant of probate or administration in the case of awards for personal war injuries and damage and other injuries to the effects of marines, pilots and salvage workers¹, personal effects of and arrears of pay, allowances, pensions and other sums due to deceased members of the armed forces² and civilian employees in Her Majesty's dockyards and naval establishments³; sums due to deceased police pensioners⁴; pensions and awards due to deceased firemen⁵; sums due as salary, wages or emoluments, or superannuation benefits to deceased civil servants⁶ and to other persons employed in various public services⁷; superannuation payments due to deceased school teachers⁸ and local authority employees⁹; and pensions or refund of pensions contributions of deceased members or office holders of the House of Commons¹⁰.

1 See the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939 ss 3-7 (all as amended); the Pensions (Mercantile Marine) Act 1942 ss 1-6, Schedule (ss 1, 2 both as amended); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 609 et seq. See also the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983, SI 1983/883 (as amended); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 595 et seq.

2 See the Army (Artillery etc) Pensions Act 1833 s 2 (as amended); the Pensions and Yeomanry Pay Act 1884 s 4 (as amended); the Regimental Debts Act 1893 ss 7, 9 (both as amended); the Navy and Marines (Property of Deceased) Act 1865 ss 6, 8 (both as amended); the Naval Pensions Act 1884 s 2 (as amended); and the Administration of Estates (Small Payments) Act 1965 s 1, Sch 1 Pts I, II (as amended) (see PARA 187 ante). See generally ARMED FORCES.

3 See the Navy and Marines (Property of Deceased) Act 1865 s 4; and ARMED FORCES.

4 See the Police Pensions Regulations 1987, SI 1987/257, reg L4(3). As to police pensions generally see POLICE vol 36(1) (2007 Reissue) PARA 407 et seq.

5 See the Firemen's Pension Scheme Order 1992, SI 1992/129, art 2(2), Sch 2 para L5(3); and FIRE SERVICES.

6 See the Superannuation Act 1972 s 4 (as amended); the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 574.

7 See the Superannuation Act 1972 ss 1(4), 4(3), Sch 1 (s 4(3), Sch 1 as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 567 et seq.

8 See the Teachers' Pensions Regulations 1997, SI 1997/3001, reg H4; and EDUCATION vol 15(2) (2006 Reissue) PARA 868.

9 See the Local Government Act 1972 s 119 (as amended); the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539; and LOCAL GOVERNMENT vol 69 (2009) PARA 446.

10 See the Parliamentary and other Pensions Act 1972 s 24 (repealed with savings); and the Parliamentary and other Pensions Act 1987 s 2(9), Sch 2; the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539; and PARLIAMENT vol 78 (2010) PARA 926 et seq.

UPDATE

72-268 The Grant of Probate or Administration

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188 Personal effects and pensions

NOTE 2--1833 Act repealed: Statute Law (Repeals) Act 2008.

NOTE 3--Navy and Marines (Property of Deceased) Act 1865 s 4 amended: Civil Partnership Act 2004 Sch 26 para 2.

NOTE 4--See also the Police Pensions Regulations 2006, SI 2006/3415, reg 83(4).

NOTE 5--SI 1992/129 r L5(3) amended: SI 2005/2980 (England), SI 2006/1672 (Wales). See also the Firefighters' Pension Scheme (England) Order 2006, SI 2006/3432, art 2, Sch 1 Pt 14 r 6; and the Firefighters' Pension Scheme (Wales) Order 2007, SI 2007/1072, art 2, Sch 1 Pt 14 r 6.

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189. Investments and insurances.

Payments may also be made, without the need to obtain a grant of probate or administration, in the case of small sums due to deceased holders of government stock and war loans¹, saving certificates², and government and savings bank annuities and insurances³, deceased national savings bank depositors⁴, and deceased members of building societies⁵, friendly societies⁶, industrial and provident societies⁷ and trade unions⁸.

1 See the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 27; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1347. Where the total value of all holdings of stock entered in the English register in the name of a deceased person at the time of his death does not exceed £5,000, and probate of his will, or letters of administration to his estate, or confirmation as executor to the estate is not or are not produced to the Bank of England within such time as the Bank of England thinks reasonable in the circumstances of the case, the Bank may, if it thinks fit, transfer the stock or any part of it: (1) to a person appearing to the Bank to be entitled to take out such probate, letters of administration or confirmation; or (2) to any other person appearing to the Bank to be a fit and proper person to receive it: Government Stock Regulations 1965, SI 1965/1420, reg 6(4) (added by SI 1990/2253).

2 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 15; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1358.

3 See the Government Annuities Act 1929 ss 21, 57 (both as amended) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1374); the Administration of Estates (Small Payments) Act 1965 s 1, Sch 1 Pt I (as amended) (see PARA 187 ante); and the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539.

4 See the National Savings Bank Act 1971 s 9 (as amended); the National Savings Bank Regulations 1972, SI 1972/764, reg 40 (as amended); and the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 814. As to the recovery of payments made under invalid nominations see *Pearman v Charlton* (1928) 44 TLR 517.

5 See the Building Societies Act 1986 s 32, Sch 7 para 1; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1900.

6 See the Friendly Societies Act 1974 ss 66-68 (all as amended); the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2229 et seq.

7 See the Industrial and Provident Societies Act 1965 ss 23-27 (ss 23-25 as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2503 et seq.

8 See the Trade Union and Labour Relations (Consolidation) Act 1992 ss 17, 18; and EMPLOYMENT vol 40 (2009) PARAS 879-880.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

189 Investments and insurances

NOTE 1--SI 1965/1420 replaced: Government Stock Regulations 2004, SI 2004/1611.

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190. Foreign conventions.

Where a convention has been concluded with any foreign country, payments and dispositions may be made in respect of deceased nationals of that country under any enactment, rule or regulation authorising payment or delivery of property without representation to consular officers of that country¹.

Payments by the Administrator of Veterans' Affairs of the United States of America made through the Secretary of State for Social Security may, at the end of the period of administration, if the beneficiary is dead and the amount involved is under £5,000, be transferred to the persons appearing to be entitled to them².

1 See PARAS 119 ante, 193 post.

2 See the USA Veterans' Pensions (Administration) Act 1949 s 1(3)(c) (amended by the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539). See also WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 626. As to the transfer of functions from the Minister of Pensions to the Secretary of State for Social Security see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 502.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

190 Foreign conventions

TEXT AND NOTE 2--1949 Act repealed: Statute Law (Repeals) Act 2004.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(viii) Estates Exempt from Necessity for Grant/191. Life policies effected abroad.

191. Life policies effected abroad.

Where a policy of life insurance has been effected with an insurance company by a person who dies domiciled elsewhere than in the United Kingdom¹, the production of a grant of representation from a court in the United Kingdom is not necessary to establish the right to receive² the policy money³.

1 As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq. For the meaning of 'United Kingdom' see PARA 18 note 4 ante.

2 The right to receive the policy money includes the right to recover it by legal proceedings: *Haas v Atlas Assurance Co Ltd* [1913] 2 KB 209.

3 See the Revenue Act 1884 s 11 (amended by the Revenue Act 1889 s 19). See also *Re Loir's Policies* [1916] WN 87. Apparently this provision does not affect the liability of the policy money to what is now inheritance tax: see *Haas v Atlas Assurance Co Ltd* [1913] 2 KB 209 at 219. As to life insurance generally see INSURANCE vol 25 (2003 Reissue) PARA 525 et seq.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(viii) Estates Exempt from Necessity for Grant/192. Funds in court.

192. Funds in court.

Where a person entitled to money in court dies without having made a will and the court is satisfied that (1) no grant of administration of his estate has been made; and (2) the assets of his estate, including the money in court, do not exceed the specified amount¹, it may order that the money be paid to the person appearing to have the prior right to a grant of administration of the estate of the deceased, for example a widower, widow, child, father, mother, brother or sister of the deceased².

1 ie the amount specified in any order in force under the Administration of Estates (Small Payments) Act 1965 s 6 (as amended) (see PARA 187 ante): see *Practice Direction-Offers to Settle and Payments into Court* (1999) PD 36 para 8.5(3). As to the CPR see PARA 37 note 3 ante. The amount currently specified is £5,000: see the Administration of Estates (Small Payments) (Increase of Limit) Order 1984, SI 1984/539, art 2; and PARA 187 ante.

2 *Practice Direction-Offers to Settle and Payments into Court* (1999) PD 36 para 8.5(3). As to the order of priority to a grant of administration see PARA 158 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(viii) Estates Exempt from Necessity for Grant/193. Consular officers.

193. Consular officers.

A consular officer has powers over property (1) where a national of a foreign state, to which the statutory provisions have been applied by Order in Council¹, is entitled to payment or delivery in England of any money or property in respect of any interest in the estate of a deceased person, or vesting in possession on the death of any person²; or (2) where the foreign national is a person to whom any money or property comprised in the estate of a deceased person may be paid or delivered in England, in pursuance of any enactment, rule or regulation (whenever passed or made) authorising payment or delivery of that money or property without representation to the estate of the deceased person being granted³. If the foreign national is not resident in England, a consular officer of the state of which he is a national has the same right and power to receive, and give a valid discharge for, the money and property as if he were duly authorised to do so by power of attorney⁴. No person, however, is authorised or required to pay or make delivery to a consular officer if he knows that some other person in England has been expressly authorised to receive the money or property on behalf of the foreign national⁵. An immunity or privilege normally enjoyed by a consular officer does not extend to any act done in the exercise of any power conferred upon him in connection with the estate of a deceased person⁶ or any document held by him in connection with it⁷.

1 Ie the Consular Conventions Act 1949 s 1 (as amended): see PARA 210 post.

2 Consular Conventions Act 1949 s 1(2)(a). As to consular officers see INTERNATIONAL RELATIONS LAW.

3 Ibid s 1(2)(b).

4 Ibid s 1(2).

5 Ibid s 1(2) proviso.

6 Ie under ibid s 1: see s 3.

7 Ibid s 3.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(ix) Application for Grant/194. Time for issuing grant.

(ix) Application for Grant

194. Time for issuing grant.

No grant of administration may issue within 14 days of the death of the deceased unless the leave of a district judge or registrar is obtained¹. Furthermore, a district judge or registrar must not allow any grant to issue until all inquiries he may see fit to make have been satisfactorily answered².

¹ See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 6(2) (as amended); and PARA 142 ante. The time limit is only seven days for probate or administration with the will annexed: see r 6(2) (as amended); and PARA 142 ante. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

² See *ibid* r 6(1) (as amended); and PARA 142 ante. As to the necessity to notify the Treasury Solicitor where the Crown is or may be interested see PARA 170 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(4) GENERAL GRANTS OF ADMINISTRATION/(ix) Application for Grant/195. Evidence.

195. Evidence.

In addition to evidence of death¹ and the evidence required for the Inland Revenue account², the person applying³ for letters of administration must swear an oath⁴ in the form applicable to the circumstances of the case⁵. The district judge or registrar may also require other papers in support⁶.

On an application for a grant of administration the oath must state in what manner all persons having a prior right to a grant have been cleared off, and whether any minority or life interest arises under the will or intestacy⁷. The oath must also state where the deceased died domiciled⁸, and whether or not, to the best of the applicant's knowledge, information and belief, there was land vested in the deceased which was settled previously to his death and which remained settled land notwithstanding his death⁹.

1 See PARA 143 et seq ante.

2 See PARA 131 ante.

3 For the provisions applicable to personal applications and those made through solicitors or probate practitioners see PARA 126 et seq ante. As to applications by trust corporations see PARA 175 ante; and as to applications by non-trust corporations see PARA 221 post.

4 See Tristram and Coote's Probate Practice (28th Edn) 1030 et seq. The title of a person to be an administrator is technically called his 'capacity', and a list of 'capacities', being the technical expressions to be used in an oath, is given in Probate Directions 1925 (as amended in respect of deaths on or after 4 April 1988): see Tristram and Coote's Probate Practice (28th Edn) 267-268.

5 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 8(1) (as amended); and PARA 128 ante. Where an applicant's right depends upon his legitimation the practice is governed by *Practice Direction* [1965] 2 All ER 560, [1965] 1 WLR 955, which gives the district judge or registrar a discretion in cases where an applicant cannot or cannot without undue hardship obtain a declaration or re-registration. Under intestacies arising on or after 1 January 1970, the Family Law Reform Act 1969 and Family Law Reform Act 1987 give rights to illegitimate relations which makes it necessary in the oath to deal with the claims of any such persons: see note 7 infra.

6 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 8(1) (as amended); and PARA 128 ante. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

7 Ibid r 8(4). See also the Supreme Court Act 1981 s 114(2); and PARA 167 ante. Where the applicant claims to be entitled to share in the estate through the death of a person who, if alive, would be entitled, the date of that person's death should be stated in the oath. For the wider form of oath necessary on or after 1 January 1970 to clear possible claims by illegitimate relations see *Practice Direction* [1969] 3 All ER 1343, [1969] 1 WLR 1863.

8 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 8(2) (as amended); and PARA 128 ante.

9 See *ibid* r 8(3); and PARA 128 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION

(i) Administration with the Will Annexed

196. When grant will be made with will annexed.

Administration with the will annexed¹ is granted in the following cases: (1) where no executor has been appointed or the appointment is void for uncertainty², or the persons appointed executors predecease the testator; (2) where the executors survive the testator but die before taking out probate³; (3) where the executors are cited to take out probate and do not appear to the citation⁴; (4) where the executors renounce probate of the will⁵; and (5) where the court exercises its discretion by passing over an executor⁶. Where a sole or last surviving executor dies intestate without having fully administered, administration is granted with the will annexed de bonis non. Special considerations apply to this form of grant⁷.

1 Subject to and in accordance with the probate rules (see PARA 16 note 6 ante) administration with the will annexed continues to be granted in every case in which the High Court had power to make such a grant before 1982: Supreme Court Act 1981 s 119(1). Where administration with the will annexed is granted, the will is to be performed and observed in the same manner as if probate of it had been granted to an executor: s 119(2). For the meaning of 'administration' see PARA 18 note 8 ante; and for the meaning of 'will' see PARA 16 note 4 ante. For the provisions of the Administration of Estates Act 1925 ss 22, 23 (as amended) relating to special executors in the case of settled land see PARAS 25 ante, 229 et seq post. As to special cases see PARA 197 post.

Administration with the will annexed is sometimes called 'administration cum testamento annexo'.

2 See PARA 7 ante.

3 Administration of Estates Act 1925 s 5(i).

4 Ibid s 5(ii). An executor cannot appear to a citation and consent to a grant to another of administration with the will annexed; he must withdraw his appearance: *Garrard v Garrard* (1871) LR 2 P & D 238. Where the executor is believed to be living, but has disappeared, a grant may be made to a beneficiary without citation of or notice to the executor: *Re Crawshay* [1893] P 108; *Re Massey* [1899] P 270; *Re Wright* (1898) 79 LT 473; *Re Williams* [1918] P 122 (absconding executor not cited; grant to legatee); *Re Leguia* [1934] P 80 (grant despite non-citation of executor, who failed to act in regard to insolvent).

5 Administration of Estates Act 1925 s 5(iii).

6 See the Supreme Court Act 1981 s 116; and PARA 180 ante. A grant of administration with the will annexed may also be made where the executor is a minor, or suffering from mental disorder, or out of the jurisdiction, but it is usual to make a grant for his use and benefit: see PARA 203 et seq post.

7 As to administration de bonis non see PARA 201 et seq post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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197. Special cases.

In certain special cases it may also be necessary to make a grant with the will annexed, as where the appointment of his executor is directed by the testator not to take effect until after an interval of time¹, or where there is a will containing a valid execution of a power, but not made in conformity with the laws of the testator's domicile².

¹ *Graysbrook v Fox* (1564) 1 Plowd 275 at 279. As to conditional appointments see PARA 13 ante.

² *Re Huber* [1896] P 209; *Re Vannini* [1901] P 330, explaining *Re Hallyburton* (1866) LR 1 P & D 90; *Re Tréfond* [1899] P 247. See also *Re Poole, Poole v Poole* [1919] P 10 (grant where will was avoided except as to exercise of power). As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

UPDATE

72-268 The Grant of Probate or Administration

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As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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198. Persons to whom grant made with will annexed.

The persons entitled to a grant¹ in respect of a will are determined in accordance with the following order of priority²:

- (1) the executor³;
- (2) any residuary legatee or devisee holding in trust for any other person⁴;
- (3) any other residuary legatee or devisee (including one for life) or where the residue is not wholly disposed of by the will, any person entitled to share in the undisposed of residue (including the Treasury Solicitor when claiming bona vacantia on behalf of the Crown)⁵;
- (4) the personal representative of any residuary legatee or devisee (but not one for life, or one holding in trust for any other person), or of any person entitled to share in any residue not disposed of by the will⁶;
- (5) any other legatee or devisee (including one for life or one holding in trust for any other person) or any creditor of the deceased⁷; and
- (6) the personal representative of any other legatee or devisee (but not one for life or one holding in trust for any other person) or of any creditor of the deceased⁸.

Provision is made for cases where two or more persons are entitled in the same degree⁹. Where all the persons entitled to the estate (whether under a will or on intestacy) have assigned their whole interest to one or more persons, the assignees replace, in the order of priority for a grant, the assignor or, if there are two or more assignors, the assignor with the highest priority¹⁰. A copy of the instrument of assignment must be lodged¹¹. Where a gift to any person fails because the donee or his or her spouse is an attesting witness¹² such person has no right to a grant as a beneficiary named in the will, without prejudice to his right to a grant in any other capacity¹³.

1 For the meaning of 'grant' see PARA 27 note 7 ante. As to probate grants see PARA 124 et seq ante. This applies where the deceased died on or after 1 January 1926: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 20.

2 See *ibid* r 20. Rule 20 (as amended) does not operate to prevent a grant being made to any person to whom a grant may or may be required to be made under any enactment: r 28(1). Rule 20 (as amended) also does not apply (except where probate is granted to an executor named, or according to the tenor (see PARA 118 ante), or where the whole estate in England and Wales consists of immovables and a grant is made limited to those (see PARA 252 post)) where the deceased died domiciled outside England and Wales: r 28(2). As to settled land grants see PARA 229 et seq post.

3 *Ibid* r 20(a), which is expressed to be subject to r 36(4)(d) (see PARA 221 post). As to executors' rights to probate see PARA 125 ante.

4 *Ibid* r 20(b).

5 *Ibid* r 20(c). However, unless a district judge or registrar otherwise directs, a residuary legatee or devisee whose legacy or devise is vested in interest is preferred to one entitled on the happening of a contingency: r 20(c) proviso (i) (amended by SI 1991/1876). In addition, where the residue is not in terms wholly disposed of, the district judge or registrar may, if satisfied that the testator has nevertheless disposed of the whole or substantially the whole of the known estate, allow a grant to be made to any legatee or devisee entitled to, or to a share in, the estate so disposed of, without regard to the persons entitled to share in any residue not disposed of by the will: Non-Contentious Probate Rules 1987, SI 1987/2024, r 20(c) proviso (ii). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. As to the Treasury Solicitor see PARA 170 et seq ante.

6 *Ibid* r 20(d).

7 Ibid r 20(e). However, unless a district judge or registrar otherwise directs, a legatee or devisee whose legacy or devise is vested in interest is preferred to one entitled on the happening of a contingency: r 20(e) proviso (amended by SI 1991/1876). As to creditors see PARA 178 et seq ante.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 20(f).

9 See ibid r 27 (as amended); and PARA 166 ante. As to joint grants see PARA 167 ante.

10 See ibid r 24(1); and PARA 159 ante. Where there are two or more assignees, the grant may, with the others' consent, be made to any one or more (not exceeding four) of them: see r 24(2); and PARA 159 ante.

11 See ibid r 24(3); and PARA 159 ante.

12 Ie under the Wills Act 1837 s 15 (as amended) (see WILLS vol 50 (2005 Reissue) PARA 343): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 21.

13 Ibid r 21.

UPDATE

72-268 The Grant of Probate or Administration

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As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

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199. Testamentary instrument merely revoking prior will.

Where a testator has revoked his will by a duly executed testamentary paper, and has died without making any disposition of his property, the grant will normally go as on an intestacy without annexing any testamentary paper¹.

¹ *Toomer v Sobinska* [1907] P 106, departing from the form of grant in *Re Durance* (1872) LR 2 P & D 406. See also *Re Irvine* [1919] 2 IR 485; and PARA 103 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

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200. Necessity for second grant.

A second grant of administration is necessary where a grant has been made with the will annexed for the benefit of a mentally incapable executor¹ and the executor dies, or where it has been made to the attorney of two executors and one of them dies². In the latter case, before a grant is made to the attorney of any surviving executor, notice must, unless dispensed with by the district judge or registrar, be given to any surviving co-executors³. The grant is made for the use and benefit of the executor and is limited until further representation is granted or in such other way as the district judge or registrar directs⁴.

¹ See PARA 212 post.

² See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 31 (as amended); and PARA 208 post. The death of a joint principal normally terminates the power: see eg *Graham v Jackson* (1845) 6 QB 811; *Life Association of Scotland v Douglas* (1886) 13 R 910, Ct of Sess; but see the Powers of Attorney Act 1971 s 5(1); and AGENCY vol 1 (2008) PARA 193. It seems that where a grant of representation has been obtained on the authority of the power, the effect of the death will depend on the terms of the grant. Accordingly, a grant to the attorney of named principals 'as their lawful attorney' would cease to have effect upon the death of one of them. See also *Re Dinshaw* [1930] P 180, where the surviving executor appointed fresh attorneys and the court revoked the original grant and made a fresh grant to the fresh attorneys. See further Tristram and Coote's Probate Practice (28th Edn) 369.

³ See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 31(2) (as amended); and PARA 208 post. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. Where the attorney administrator of one of two persons equally entitled to a grant has died the attorney of the other will be appointed on proof of notice to the person whose attorney has died: *Re Barton* [1898] P 11.

⁴ See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 31(1) (as amended); and PARA 208 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(ii) Unadministered Estate/201. Grant de bonis non.

(ii) Unadministered Estate

201. Grant de bonis non.

Where a sole or last surviving executor dies intestate without having fully administered the testator's estate, the deceased executor's administrator does not become the representative of the original testator¹, and it is accordingly necessary to appoint an administrator to administer the goods of the original testator left unadministered². This is a grant of administration cum testamento annexo de bonis non administratis (that is, 'with the will annexed for unadministered estate')³.

A grant for the administration of unadministered estate is also made where the deceased dies intestate and the original administrator did not complete the administration of the estate. Both types of grant are described as 'de bonis non'.

Where the will of the original testator has been proved abroad and the executor dies without proving it in England, the latter's executor, even though he proves his own testator's will in England, does not then become the representative of the original testator; he must obtain a grant of administration in respect of the original testator's estate in England⁴. Where an executor has acted and dies intestate without having obtained probate, the grant of administration made to the testator's estate is a simple grant with the will annexed⁵ and not a grant de bonis non⁶.

Similarly, on the death of a sole or sole surviving administrator appointed upon an intestacy, the chain of representation must be continued by the appointment of an administrator de bonis non⁷. The court also has power to appoint an administrator for unadministered estate where the original administrator has disappeared⁸.

The applicant for administration de bonis non must prepare the usual account for Inland Revenue purposes and take the oath⁹.

1 As to the chain of representation see PARA 47 et seq ante.

2 2 Bl Com (14th Edn) 506. Where, after advertisement without result, the sole or surviving executor has paid the unclaimed residue of an estate to the Crown as bona vacantia this residue does not form part of the unadministered estate and the administrator de bonis non has as such no title to it: *Re Aldhous, Noble v Treasury Solicitor*[1955] 2 All ER 80, [1955] 1 WLR 459. As to the Crown's right to bona vacantia see PARA 170 ante.

3 The phrase 'de bonis non' is not strictly accurate since the grant covers land as well as goods. The phrase 'unadministered estate' may be more appropriate and is here used interchangeably with the more colloquial 'de bonis non'.

4 *Re Gaynor*(1869) LR 1 P & D 723.

5 See PARA 196 ante.

6 *Wankford v Wankford* (1704) 1 Salk 299 at 308.

7 2 Bl Com (14th Edn) 506. As to intestate succession see PARA 583 et seq post.

8 *Re Saker*[1909] P 233; *Re French*[1910] P 169.

9 See the Supreme Court Act 1981 s 109(1) (as amended); and PARA 131 ante. The estate is sworn at the value of what remains unadministered at the time. Where inheritance tax in respect of the full value of the estate was paid in the first instance, no further tax is payable. See Tristram and Coote's Probate Practice (28th Edn) 298-299; and INHERITANCE TAXATION vol 24 (Reissue) PARA 655.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(ii) Unadministered Estate/202. Rights of preference observed.

202. Rights of preference observed.

In making a grant for unadministered estate¹ the court has regard to the same rights of preference by which an original grant is regulated, and accordingly follows the general practice of making the grant to those who have the greatest interest².

A grant for the unadministered estate with the will annexed is made to the person entitled in the order of priority previously explained³, and the court may at its discretion dispense with formal notice to an executor who has expressed his intention not to act further⁴. Such a grant will not be made to the legal personal representative of a minor or other beneficiary under the statutory trusts in respect of any property not disposed of in the will, unless the beneficiary has attained an absolutely vested interest⁵.

1 See PARA 201 note 3 ante.

2 *Savage v Blythe* (1796) 2 Hag Ecc App 150; *Almes v Almes* (1796) 2 Hag Ecc App 155; *Re Carr* (1867) LR 1 P & D 291; *Re Griffiths, Morgan v Stephens* [1917] P 59 (interest suit). See also PARA 198 ante.

3 See PARA 198 ante.

4 *Re Campion* [1900] P 13.

5 Ie by coming of age or marrying before the age of 18: see PARA 604 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iii) Administration during Minority of Person Entitled/203. Grants on behalf of minors.

(iii) Administration during Minority of Person Entitled

203. Grants on behalf of minors.

Where the person to whom a grant¹ would otherwise be made² is a minor, administration for his use and benefit limited until he attains the age of 18³ must⁴, unless otherwise directed, and subject to the overriding power set out below⁵ and to the right of a residuary beneficiary⁶ be granted⁷ to: (1) a parent of the minor who has or is deemed to have parental responsibility for him⁸; (2) a person who has or is deemed to have parental responsibility for the minor⁹; (3) a guardian of the minor¹⁰; or (4) a local authority which has or is deemed to have parental responsibility for the minor¹¹.

Where the minor is sole executor and has no interest in the residuary estate of the deceased, administration for the use and benefit of the minor limited until he attains the age of 18, unless a district judge¹² or registrar¹³ otherwise directs, must be granted to the person entitled to the residuary estate¹⁴. A district judge or registrar has, however, an overriding power to order the appointment of a person to obtain administration for the use and benefit of the minor, limited until he attains the age of 18, in default of, or jointly with, or to the exclusion of, any person mentioned in heads (1) to (4) above¹⁵. Where there is only one person competent and willing to take a grant¹⁶, such person may, unless a district judge or registrar otherwise directs, nominate any fit and proper person to act jointly with him in taking the grant¹⁷.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 Ie either as sole executor or as administrator. For the statutory provisions as to administration during the minority of an executor see PARA 16 ante. For the principle that an adult has a prior right where more than one person is entitled see PARA 166 ante.

3 An executor who is a minor is entitled to probate when he comes of age: see PARA 16 ante.

4 It seems that this provision is subject to the court's discretionary power to appoint some person other than the person by law entitled: see PARA 180 ante; and cf *Re Stewart (or Stuart)* (1875) LR 3 PD 244, where administration was granted to persons who by a will were appointed trustees on behalf of an executor who was a minor and a beneficiary.

5 Ie subject to the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(2) (as substituted) (see note 15 infra); see r 32(1).

6 Ie subject to *ibid* r 32(1) proviso (as amended): see note 14 infra.

7 Ibid r 32(1). For the evidence required in support of an application for a grant on behalf of a minor see *Practice Direction*[1991] 4 All ER 562, [1991] 1 WLR 1069.

8 Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(1)(a) (substituted by SI 1991/1876). A parent has parental responsibility in accordance with the Children Act 1989 ss 2(1), 2(2) or 4, s 108(6), Sch 14 paras 4 or 6, or an adoption order within the meaning of the Adoption Act 1976 s 12(1) (as amended): Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(1)(a) (as so substituted). As to parental responsibility see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 133 et seq.

9 Ibid r 32(1)(aa) (added by SI 1998/1903). A person has parental responsibility by virtue of the Children Act 1989 s 12(2) where the court has made a residence order under s 8 (as amended) in respect of the minor in favour of that person (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 262): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(1)(aa) (as so added).

10 Ibid r 32(1)(b) (substituted by SI 1991/1876; and amended by SI 1998/1903). This applies to a guardian who is appointed or deemed to have been appointed in accordance with the Children Act 1989 s 5 or Sch 14 paras 12, 13 or 14 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 144 et seq): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(1)(b) (as so substituted and amended).

11 Ibid r 32(1)(c) (added by SI 1998/1903). A local authority has parental responsibility by virtue of the Children Act 1989 s 33(3) where the court has made a care order under s 31(1)(a) in respect of the minor and that local authority is designated in that order (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 276 et seq): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(1)(c) (as so added).

12 For the meaning of 'district judge' see PARA 27 note 6 ante.

13 For the meaning of 'registrar' see PARA 27 note 7 ante.

14 Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(1) proviso (amended by SI 1991/1876).

15 Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(2) (substituted by SI 1991/1876). Application for such an order may be made ex parte (see PARA 99 ante) by the intended appointee, who must file a supporting affidavit: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(2) (as so substituted). The right of a minor to administration may be renounced only by a person appointed under r 32(2) (as substituted), and authorised by the district judge or registrar to renounce on behalf of the minor: r 34(2) (amended by SI 1991/1876).

16 Ie under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32 (as amended): see r 32(3) (as amended: see note 17 infra).

17 Ibid r 32(3) (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

203 Grants on behalf of minors

TEXT AND NOTES 1-11--Also, heads (5) a step-parent of the minor who has parental responsibility for him in accordance with the 1989 Act s 4A (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 140); (6) a special guardian of the minor who is appointed in accordance with s 14A (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008

Reissue) PARA 151); and (7) an adoption agency which has parental responsibility for the minor by virtue of the Adoption and Children Act 2002 s 25(2) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 334): SI 1987/2024 r 32(1)(ab), (ba), (bb) (added by SI 2005/3504).

NOTE 8--Reference to 1989 Act is now to ss 2(1), 2(1A), 2(2), 2(2A), 4 or 4ZA, Sch 14 para 4 or 6 and reference to 1976 Act s 12 is also to 2002 Act s 46(1): SI 1987/2024 r 32(1)(a) (amended by SI 2005/3504, SI 2009/1893).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iii) Administration during Minority of Person Entitled/204. Necessity for two administrators.

204. Necessity for two administrators.

Where two administrators are necessary because of a minority or life interest¹ and there is only one person competent and willing to take a grant during minority, he may nominate a fit and proper person as his co-administrator and, unless a district judge or registrar otherwise directs, joint administration will be granted to them².

¹ le by virtue of the Supreme Court Act 1981 s 114(2): see PARA 167 ante.

² See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32(3) (amended by SI 1991/1876); and PARA 203 ante. A summons is not normally needed in this case: see PARA 168 ante. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iii) Administration during Minority of Person Entitled/205. Co-executor a minor.

205. Co-executor a minor.

Where a minor is appointed executor jointly with one or more other executors, probate may be granted to the executor or executors not under disability, with power reserved to the minor executor and the minor executor is entitled to apply for probate on attaining the age of 18 years¹. Administration for the use and benefit of a minor executor until he attains the age of 18 years may be granted² if, and only if, the executors who are not under disability renounce or, on being cited to accept or refuse a grant, fail to make an effective application for it³. The right of a minor executor to probate on attaining the age of 18 may not be renounced by any person on his behalf⁴. A minor executor to whom power is reserved will not be liable for the acts of his co-executors until he takes out probate⁵.

1 Non-Contentious Probate Rules 1987, SI 1987/2024, r 33(1). See also 4 Burn's Ecclesiastical Law (9th Edn) 310; *Cummins v Cummins* (1845) 3 Jo & Lat 64.

2 He under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 32 (as amended) (see PARAS 203-204 ante): see r 33(2).

3 Ibid r 33(2). See also *Foxwist v Tremain* (1670) 1 Mod Rep 47.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 34(1).

5 *Russel's Case* (1584) 5 Co Rep 27a; *Whitmore v Weld* (1685) 1 Vern 326 at 328; *Cummins v Cummins* (1845) 3 Jo & Lat 64.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iii) Administration during Minority of Person Entitled/206. Limit of grant.

206. Limit of grant.

The administration during minority determines upon the coming of age of the minor or of any one of several minors for whose use and benefit the grant was made¹. It does not determine upon the death of one of several minors², but if the guardian dies during their minority a second grant becomes necessary³. Except in point of time there is no other limit to the administration⁴.

1 See PARAS 203-205 ante.

2 *Jones v Earl of Strafford* (1730) 3 P Wms 79 at 89. A fresh grant is necessary on the coming of age of the minor. As to cessate grants see PARA 153 ante. If all the minors for the use and benefit of whom the grant has

been made die before reaching the age of 18 the grant ceases, and a grant of administration de bonis non becomes necessary. As to grants de bonis non see PARA 201 ante.

3 See PARA 153 ante.

4 *Re Cope, Cope v Cope* (1880) 16 ChD 49; *Monsell v Armstrong* (1872) LR 14 Eq 423; *Re Thompson and M'Williams' Contract* [1896] 1 IR 356.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iii) Administration during Minority of Person Entitled/207. Administrator's liability to account.

207. Administrator's liability to account.

On his coming of age the minor is entitled to call for an account from the administrator, even though his administration may previously have been revoked and his successor in office may have released him¹. If the minor renounces on coming of age, the person who is then appointed administrator is in a position to call for an account². During his term of office a judgment for administration may be made against an administrator during minority³.

1 1 Roll Abr 910, Executor (M), pl 3. As to revocation see PARA 256 et seq post.

2 *Taylor v Newton* (1752) 1 Lee 15.

3 *Re Taylor, Sewell v Ransford* (1873) 21 WR 244. See PARA 705 et seq post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act

1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iv) Administration by Attorneys and Consular Officers/208. Grants to attorneys.

(iv) Administration by Attorneys and Consular Officers

208. Grants to attorneys.

The lawfully constituted attorney of a person entitled to a grant¹ may apply for administration for the use and benefit of the donor, and such grant is limited until further representation is granted, or in such other way as the district judge² or registrar³ may direct⁴. Where the donor is an executor, notice of the application must be given to any other executor unless such notice is dispensed with by the district judge or registrar⁵. Where the donor is mentally incapable and the attorney is acting under an enduring power of attorney, provision is made for an application by the attorney⁶.

Where an attorney administrator seeks a concurrent grant in another estate in his capacity of personal representative, this further grant will not be issued without inspection of the power of attorney. A power in general terms appointing the attorney for all purposes will be accepted as establishing his right to apply for the further grant; but if the power is a limited one confined to obtaining the first grant, a further power extending the attorney's duties to obtaining the further grant will be required⁷.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 For the meaning of 'district judge' see PARA 27 note 6 ante.

3 For the meaning of 'registrar' see PARA 27 note 7 ante.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 31(1) (amended by SI 1991/1876). A substituted attorney will be accepted, if substitution is authorised by the power, or by the laws of the domicile of the creator of the power: *Re Abdul Hamid Bey* (1898) 67 LJP 59. A general power executed during the testator's lifetime has been held sufficient: *Re Barker* [1891] P 251; cf *Re Cassidy* (1832) 4 Hag Ecc 360. It does not exclude the claims of other persons entitled: *Anstruther v Chalmers* (1826) 2 Sim 1. See also *Re Rendell*, *Wood v Rendell* [1901] 1 Ch 230; *Re Boyd* (1912) 46 ILT 294. Where a grant has been made to the attorney of a person entrusted with administration of the estate or entitled to administer the estate of a person who has died domiciled abroad and the donor of the power of attorney subsequently applies for a grant to himself, a further order is necessary, and it must be shown by affidavit that he is the person at that time entrusted with the administration by the foreign court, or that he is still entitled by the law of the foreign country to administer the estate: *Practice Direction* [1953] 2 All ER 1154, [1953] 1 WLR 1237.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 31(2) (amended by SI 1991/1876).

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 31(3). Provision is made under r 35 (as amended) (see PARAS 212-213 post): see r 31(3). As to enduring powers of attorney see AGENCY vol 1 (2008) PARA 195 et seq.

7 *Practice Direction* [1957] 1 All ER 602, [1957] 1 WLR 464.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

208 Grants to attorneys

TEXT AND NOTES--SI 1987/2024 r 31 amended: SI 2007/1898.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iv) Administration by Attorneys and Consular Officers/209. Requirements for grant to attorney administrators.

209. Requirements for grant to attorney administrators.

The attorney need not necessarily be resident in England¹, and residence abroad may be accepted².

A grant cannot be made to a single person as attorney if there is a minority, or if a life interest arises under the will or intestacy, even though a sole executor as such would be entitled to probate³. In all such cases two attorneys or a trust corporation, with or without an individual in addition, must be appointed to obtain the grant⁴.

If the grant is made to the attorneys of one only of several executors, it is limited until the principal or any one of the other executors applies for probate⁵. On the death of the principal, or on any other event which would operate as a revocation of the power of attorney, such a grant ceases to be effective⁶. For this reason an administrator under such a grant has been held to be unable to make a title to property such as a purchaser was bound to accept⁷. An informal document clearly purporting to authorise the applicant to apply for the grant may be accepted⁸. Such a power of attorney is exempt from stamp duty⁹. If the original is a general power of attorney it may be withdrawn from the registry after grant provided an examined copy is lodged before withdrawal.

1 *Re Leeson* (1859) 1 Sw & Tr 463.

2 *Re Reed* (1864) 3 Sw & Tr 439; *Re Ballingall* (1863) 3 Sw & Tr 441n.

3 See the Supreme Court Act 1981 s 114(2); and PARA 167 ante.

4 *Ie* under *ibid* s 114(2): see PARA 167 ante.

5 *Re Black* (1887) 13 PD 5. No grant will be made without notice to the other executors, but the district judge or registrar may dispense with such notice: see PARA 208 ante.

6 *Webb v Kirby* (1856) 7 De GM & G 376.

7 *Webb v Kirby* (1856) 7 De GM & G 376 (a grant de bonis non then becomes necessary: see PARA 201 ante); *Taynton v Hannay* (1802) 3 Bos & P 26. As to the effect of the death of one of joint principals see PARA 200 note 2 ante. Persons dealing with such an administrator can, it seems, take advantage of the provisions of the Powers of Attorney Act 1971 s 5: see AGENCY vol 1 (2008) PARA 193.

8 *Re Elderton* (1832) 4 Hag Ecc 210 (memorandum); *Re Ormond* (1828) 1 Hag Ecc 145; *Re Boyle* (1864) 3 Sw & Tr 426 per Lord Penzance.

9 This is the case unless it is a general power and was executed before 19 March 1985: see the Stamp Act 1891 s 1, Sch 1; the Finance Act 1985 s 85, Sch 24; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1002.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

209 Requirements for grant to attorney administrators

NOTE 9--Stamp Act 1891 s 1, Sch 1 repealed: Finance Act 1999 Sch 19 para 1, Sch 20 Pt V(2).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iv) Administration by Attorneys and Consular Officers/210. Grant to consular officer as if to attorney.

210. Grant to consular officer as if to attorney.

In cases in which a national of a foreign state to which the statutory provisions¹ have been applied by Order in Council² is named as executor in the will of a deceased person disposing of property in England, or is otherwise a person to whom a grant of representation to the estate in England of a deceased person may be made, then if the court is satisfied, on the application of a consular officer of the foreign state, that the foreign national is not resident in England and, if no application for a grant of representation is made by a person duly authorised by power of attorney to act for him in that behalf, the court must make to the applicant consular officer any such grant of representation to the estate of the deceased as would be made to the consular officer if he were duly authorised by power of attorney to apply for it³. The court, however, if it thinks fit, may postpone the making of the grant during such period as it considers appropriate having regard to the circumstances of the case⁴. Such a grant of representation may be made to the consular officer alone notwithstanding that a minority or life interest may be involved⁵, and sureties are not required⁶. The grant may be made to the consular officer by his official title and to his successors in office; and in such a case all the office of administrator and all the

estate, rights, duties and liabilities of the administrator are vested in and imposed on the person for the time being holding the office⁷.

No fresh grant can be required by reason only of the death or vacation of office of the person to whom the grant was made or in whom it is vested⁸, but this provision does not affect any limitation contained in the grant, or any power of the court to revoke the grant⁹.

1 le the Consular Conventions Act 1949 s 1 (as amended): see the text to notes 3-9 infra; and PARA 193 ante.

2 The following Consular Conventions Orders applying the Consular Conventions Act 1949 s 1 (as amended) have been made under s 6 (as amended) (which allows s 1 (as amended) to be applied by order to any foreign state with which a consular convention providing for matters for which provision is made by s 1 (as amended) has been concluded): the Consular Conventions (Kingdom of Norway) Order in Council 1951, SI 1951/1165; the Consular Conventions (Kingdom of Sweden) Order 1952, SI 1952/1218; the Consular Conventions (Kingdom of Greece) Order 1953, SI 1953/1454; the Consular Conventions (French Republic) Order 1953, SI 1953/1455; the Consular Conventions (United States of Mexico) Order 1955, SI 1955/425; the Consular Conventions (Federal Republic of Germany) Order 1957, SI 1957/2052; the Consular Conventions (Italian Republic) Order 1957, SI 1957/2053; the Consular Conventions (Kingdom of Denmark) Order 1963, SI 1963/370; the Consular Conventions (Spanish State) Order 1963, SI 1963/614; the Consular Conventions (Republic of Austria) Order 1963, SI 1963/1927; the Consular Conventions (Kingdom of Belgium) Order 1964, SI 1964/1399; the Consular Conventions (Japan) Order 1965, SI 1965/1714; the Consular Conventions (Socialist Federal Republic of Yugoslavia) Order 1966, SI 1966/443; the Consular Conventions (Union of Soviet Socialist Republics) Order 1968, SI 1968/1378; the Consular Conventions (People's Republic of Bulgaria) Order 1968, SI 1968/1861; the Consular Conventions (Polish People's Republic) Order 1971, SI 1971/1238; the Consular Conventions (Hungarian People's Republic) Order 1971, SI 1971/1845; the Consular Conventions (Mongolian People's Republic) Order 1976, SI 1976/1150; the Consular Conventions (Czechoslovak Socialist Republic) Order 1976, SI 1976/1216; and the Consular Conventions (Arab Republic of Egypt) Order 1986, SI 1986/216.

Any such order may be revoked by a subsequent order: Consular Conventions Act 1949 s 6(2).

3 Ibid s 1(1). As to grants to attorneys see PARAS 208-209 ante.

4 Ibid s 1(1) proviso.

5 See ibid s 1(4) (amended by the Supreme Court Act 1981 s 152(1), Sch 5), excluding the application of the Supreme Court Act 1981 s 114(2) (see PARAS 161, 167 ante).

6 See ibid s 120(5); and PARA 255 post.

7 Consular Conventions Act 1949 s 1(3) (amended by the Administration of Estates Act 1971 s 12, Sch 2 Pt II).

8 Consular Conventions Act 1949 s 1(3) (as amended: see note 7 supra).

9 Ibid s 1(3) proviso.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(iv) Administration by Attorneys and Consular Officers/211. Attorney's position.

211. Attorney's position.

As regards the claims of third parties, an attorney administrator is as fully an administrator as if he had obtained the grant in his own right¹, and is liable to be sued by the parties beneficially interested in the estate². An attorney administrator may be directed to obtain the protection of the Trustee Act 1925³ by advertisement for foreign claims⁴, and it has been held that if, before being sued, he pays over money to the principal on whose behalf he has obtained the grant, he gets a good discharge⁵. He cannot, however, get a good discharge from a principal who has not obtained representation in any country⁶.

An attorney administrator for a foreign principal who either is an executor or according to the law of the domicile stands in the place of an executor, may be authorised to hand over any surplus after satisfaction of English liabilities and foreign liabilities of which he has notice, to his foreign principal⁷, but the fact that he is so authorised or justified does not necessarily imply that he is under any duty to do so, and since the court has a duty to see that the persons charged with the administration of the estate in England carry the dispositions contained in an English will into effect the court may order distribution accordingly⁸.

1 *Re Dewell, Edgar v Reynolds* (1858) 4 Drew 269 at 272; *Re Rendell, Wood v Rendell* [1901] 1 Ch 230.

2 *Chambers v Bicknell* (1843) 2 Hare 536. As to the liabilities of a personal representative on which he may be sued see PARA 787 et seq post.

3 See the Trustee Act 1925 s 27 (as amended); para 382 post; and TRUSTS vol 48 (2007 Reissue) PARA 915.

4 *Re Holden, Isaacson v Holden* [1935] WN 52.

5 *De Viesca v Lubbock* (1840) 10 Sim 629; *Eames v Hacon* (1881) 18 ChD 347, CA.

6 *Re Rendell, Wood v Rendell* [1901] 1 Ch 230.

7 *Re Achilopoulos, Johnson v Mavromichali* [1928] Ch 433; *Re Weiss* [1962] P 136, [1962] 1 All ER 308.

8 *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1, [1961] All ER 710; *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(v) Administration during Incapacity of Person Entitled/212. Grant in case of mental incapacity.

(v) Administration during Incapacity of Person Entitled

212. Grant in case of mental incapacity.

Where a district judge¹ or registrar² is satisfied that a person entitled to a grant³ is, by reason of mental incapacity⁴, incapable of managing his affairs, administration for his use and benefit, limited until further representation be granted or in such other way as the district judge or registrar may direct, may be granted⁵. The grant is not made unless all persons entitled in the same degree as the person incapable have been cleared off, but a district judge or registrar may otherwise direct⁶. In the case of mental incapacity, notice of intended application for a grant *durante dementia*⁷ must be given to the Court of Protection⁸, except where the applicant is the person authorised by the Court of Protection to apply for the grant⁹.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 For the meaning of 'grant' see PARA 27 note 7 ante.

4 I.e. where a person is mentally disordered: cf *Ex p Evelyn* (1833) 2 My & K 3; and see *Hill v Mills* (1691) 1 Salk 36; *Evans v Tyler* (1849) 2 Rob Eccl 128; *Hewson v Shelley* [1914] 2 Ch 13 at 43, CA. See also MENTAL HEALTH vol 30(2) (Reissue) PARA 596 et seq. In this case the grant is called a grant *durante dementia*. See also Heywood and Massey's Court of Protection Practice (12th Edn) 237-242.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(2) (amended by SI 1991/1876). As to the order of priority for such a grant see PARA 213 post. As to the revocation of a grant on these grounds see PARA 259 post.

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(1) (amended by SI 1991/1876). This rule will apply, for example, if there is another executor willing and competent to take probate.

7 See note 4 *supra*.

8 As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 676. The notice is given informally by letter.

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(5) (amended by SI 1998/1903). As to the person authorised by the Court of Protection see PARA 213 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act

1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

212 Grant in case of mental incapacity

TEXT AND NOTES--SI 1987/2024 r 35 amended: SI 2007/1898.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(v) Administration during Incapacity of Person Entitled/213. Person to whom the grant is made.

213. Person to whom the grant is made.

In the case of mental incapacity¹, the grant² may be made to the person authorised by the Court of Protection to apply for the grant³. Where there is no person so authorised, the grant may be made to the lawful attorney of the incapable person acting under a registered enduring power of attorney⁴. Where there is no such attorney entitled to act, or if the attorney renounces administration for the use and benefit of the incapable person, the grant may be made to the person entitled to the residuary estate of the deceased⁵. Where a grant is required to be made to not less than two administrators⁶, and there is only one person competent and willing to take a grant, administration may, unless a district judge⁷ or registrar⁸ otherwise directs, be granted to such person jointly with any other person nominated by him⁹. Notwithstanding the foregoing, administration for the use and benefit of the incapable person may be granted to such other person as the district judge or registrar may by order direct¹⁰.

If the mentally incapacitated person, although having the prior right to administer, is not the only person entitled on distribution, the grant may in a suitable case be made to another of the persons entitled in distribution on his on behalf¹¹.

1 See PARA 212 ante.

2 For the meaning of 'grant' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(2)(a). See also Heywood and Massey's Court of Protection Practice (12th Edn) 237-242; and MENTAL HEALTH vol 30(2) (Reissue) PARA 681 et seq.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(2)(b). As to the requirements on such an application see *Practice Direction* [1986] 2 All ER 41, [1986] 1 WLR 419. As to enduring powers of attorney see AGENCY vol 1 (2008) PARA 195 et seq.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(2)(c).

6 See PARA 167 ante.

7 For the meaning of 'district judge' see PARA 27 note 6 ante.

8 For the meaning of 'registrar' see PARA 27 note 7 ante.

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(3) (amended by SI 1991/1876).

10 Non-Contentious Probate Rules 1987, SI 1987/2024, r 35(4) (amended by SI 1991/1876; and SI 1998/1903). See also *Re Hastings* (1877) 4 PD 73.

11 *Re Williams* (1830) 3 Hag Ecc 217. This will in practice be done only in exceptional circumstances, and would be by means of an order under the court's discretionary powers: see PARA 180 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

213 Person to whom the grant is made

TEXT AND NOTES 1-10--SI 1987/2024 r 35 amended: SI 2007/1898.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(v) Administration during Incapacity of Person Entitled/214. Grant to stranger or creditor.

214. Grant to stranger or creditor.

If all persons interested in the estate of an intestate renounce and consent, the court will make a grant to a creditor for the use and benefit of the mentally incapacitated person¹ or to a stranger for the like use².

Before a creditor or other person with an inferior title can obtain a grant where the person first entitled is a mentally incapacitated person, the latter and his next of kin should be cited³.

1 *Re Penny* (1846) 1 Rob Eccl 426.

2 *Re Burrell* (1858) 1 Sw & Tr 64 (stepmother); *Re Eccles* (1889) 15 PD 1.

3 *Re Sharland, Windeatt v Sharland* (1871) LR 2 P & D 266.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act

1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(v) Administration during Incapacity of Person Entitled/215. Representative becoming mentally incapable after grant.

215. Representative becoming mentally incapable after grant.

Where a sole representative becomes mentally incapacitated after having obtained a grant, the practice is, without revoking the old grant, to make a new grant (1) if there is a person authorised by the Court of Protection to apply for the grant, to that person¹; or (2) if there is none, to the residuary legatee or devisee, in the case of testacy, and in the case of intestacy to another of the persons entitled to share in the estate². A new grant may also be made to the representative's attorney acting under an enduring power of attorney³. The new grant is for the use and benefit of the person mentally incapacitated during his incapacity; it is usually a general grant, but may be limited⁴.

In the case of a foreigner, the new grant may be made to the foreign curator⁵. In the case of one of several executors or administrators becoming mentally incapacitated, the old grant is revoked and a new grant made to the other representatives⁶.

Where a grant has been issued to an attorney of a donor for the use and benefit of that donor and the donor becomes mentally incapable, the attorney will be able to continue with the administration, provided that the donor has also appointed the same attorney under a sufficient enduring power of attorney which has been registered with the Court of Protection, even if the power of attorney used on the grant application was a different power of attorney and it has been revoked by the donor's mental incapacity⁷.

1 See PARA 213 ante.

2 *Re Crump* (1821) 3 Phillim 497. See Heywood and Massey's Court of Protection Practice (12th Edn) 241; and MENTAL HEALTH vol 30(2) (Reissue) PARA 627.

3 See *Practice Direction* [1986] 2 All ER 41, [1986] 1 WLR 419; and PARA 213 ante. An attorney under an enduring power of attorney is not able to continue the administration on behalf of the grantee in reliance on the power of attorney: see *Practice Direction* supra. As to enduring powers of attorney see AGENCY vol 1 (2008) PARA 195 et seq.

4 See *Re Crump* (1821) 3 Phillim 497; and Heywood and Massey's Court of Protection Practice (12th Edn) 242.

5 *Re Goldschmidt* (1898) 78 LT 763.

6 *Re Shaw* [1905] P 92; *Re Newton* (1843) 3 Curt 428. See also *Re Clifton* [1931] P 222; and Heywood and Massey's Court of Protection Practice (12th Edn) 241-242. As to attorneys acting under an enduring power of attorney see note 3 supra.

7 See *Practice Direction* [1986] 2 All ER 41, [1986] 1 WLR 419.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vi) Administration pending Suit/216. Grant pendente lite.

(vi) Administration pending Suit

216. Grant pendente lite.

Where any legal proceedings concerning the validity of the will¹ of a deceased person, or for obtaining, recalling or revoking any grant² are pending, the High Court may grant administration³ of the estate⁴ of the deceased person in question to an administrator pending suit, who has all the rights, duties and powers of a general administrator⁵. An administrator pending suit is subject to the immediate control of the court and must act under its direction; and, except in such circumstances as may be prescribed⁶, no distribution of the estate, or any part of the estate, of the deceased person in question may be made by such an administrator without the leave of the court⁷. The court may, out of the estate of the deceased, assign an administrator pending suit such reasonable remuneration as it thinks fit⁸. The court is not bound in this case to appoint two such administrators where a life or minority interest arises⁹.

1 For the meaning of 'will' see PARA 16 note 4 ante. See also *Re Miesegaes, Miesegaes v Miesegaes* [1950] WN 232.

2 For the meaning of 'grant' see PARA 79 note 2 ante.

3 For the meaning of 'administration' see PARA 18 note 8 ante.

4 For the meaning of 'estate' see PARA 16 note 5 ante.

5 Supreme Court Act 1981 s 117(1), which is expressed to be subject to s 117(2) (see the text to note 7 infra).

6 'Prescribed' means prescribed by rules of court: *ibid* s 151(1). As to the prescribed procedure see *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.2, applying CPR Sch 1 RSC Ord 30; and PARA 218 post. As to the CPR see PARA 37 note 3 ante.

7 Supreme Court Act 1981 s 117(2).

8 *Ibid* s 117(3).

9 See *Re Lindley, Lindley v Lindley* [1953] P 203, [1953] 2 All ER 319; *Re Haslip* [1958] 2 All ER 275n, [1958] 1 WLR 583. See also PARA 167 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

216-219 Grant pendente lite ... Determination of office

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. As to the procedure relating to administration pending the determination of a probate claim see now para 218.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vi) Administration pending Suit/217. Exercise of jurisdiction.

217. Exercise of jurisdiction.

To found the jurisdiction to make a grant pending suit there must be a probate claim actually pending in the Chancery Division¹. Proceedings on a caveat do not constitute a claim². The application may be made by any person, whether or not a party to the pending action, as, for instance, a creditor³; but the court has no power to order the administrator to pay the creditor's debt⁴. The jurisdiction is not exercised where there is a person legally entitled to represent or take possession of the property, as in the case of a surviving partner⁵, but it is not confined to cases of necessity⁶.

1 As to grants and appointments of representatives ad litem for the purpose of other proceedings see PARA 225 post. As to the jurisdiction of the Chancery Division see PARA 74 ante.

2 See *Salter v Salter* [1896] P 291, CA.

3 See *Tichborne v Tichborne, ex p Norris* (1869) LR 1 P & D 730; *Re Evans, Evans v Evans* (1890) 15 PD 215; *Re Cleaver* [1905] P 319.

4 *Re Evans, Evans v Evans* (1890) 15 PD 215. Except with the consent of all interested parties, the court cannot pay maintenance out of the estate to a residuary legatee: *Whittle v Keats* (1866) 35 LJP & M 54; cf *Re Harver, Harver v Harver* (1889) 14 PD 81.

5 *Horrell v Witts and Plumley* (1866) LR 1 P & D 103. In small estates expense may be saved by an undertaking given to the court by the personal representatives in lieu of the appointment of an administrator pending suit: see *Re Day* [1940] 2 All ER 544.

6 *Bellew v Bellew* (1865) 34 LJP & A 125, where Sir J P Wilde said that he would not follow the established practice of requiring a case of necessity to be made out before making the grant, but would adopt the practice of the Chancery courts, and make the grant wherever a Chancery court would appoint a receiver. The same principle was followed in *Re Bevan, Bevan v Houldsworth* [1948] 1 All ER 271, CA.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

216-219 Grant pendente lite ... Determination of office

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. As to the procedure relating to administration pending the determination of a probate claim see now para 218.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vi) Administration pending Suit/218. Procedure.

218. Procedure.

An application¹ for an order for the grant of administration may be made by application notice in the probate proceedings in question². If an order is made an application for the grant of letters of administration should be made at the principal probate registry of the Family Division³. It is not the practice, except by consent, to appoint a party to the claim either as administrator or as receiver⁴, although, where it is clearly desirable, a party to the claim may be appointed⁵. If the parties will not agree, the appointment of a neutral administrator is left to the master or district judge⁶. Every application relating to the conduct of the administration must be made by application notice in the probate proceedings in question⁷.

1 le under the Supreme Court Act 1981 s 117 (see PARA 216 ante): see *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.1. As to the CPR see PARA 37 note 3 ante.

2 *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.1.

3 *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.4. The order may be made by a master or district judge: para 15.3. Where an order for a grant of administration is made, CPR Sch 1 RSC Ord 30 rr 2, 4 and 6 and (subject to the Supreme Court Act 1981 s 117(3) (see PARA 216 ante)) CPR Sch 1 RSC Ord 30 r 3, apply as if the administrator were a receiver appointed by the court: *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.2. A copy of the order must be served by the party having conduct of the proceedings on the administrator and all other parties: para 15.2, applying CPR Sch 1 RSC Ord 30 r 4. The order may include such directions as the court thinks fit as to the giving of security by the person appointed, and the court may fix the amounts and frequency of payments into court to be made by a receiver: *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.2, applying CPR Sch 1 RSC Ord 30 rr 2, 6.

4 *Stratton v Ford* (1754) 2 Lee 49 at 50; *Northey v Cock* (1822) 1 Add 326 at 330 per Sir J Nicholl; *Young (otherwise Mearing) v Brown* (1827) 1 Hag Ecc 53; *De Chatelain v Pontigny* (1858) 1 Sw & Tr 34; *Re Shorter, Shorter v Shorter* [1911] P 184 (executor not appointed).

5 *Re Griffin, Griffin v Ackroyd* [1925] P 38.

6 *Whittle v Keats* (1866) 35 LJP & M 54; *Re Bevan, Bevan v Houldsworth* [1948] 1 All ER 271 at 274, CA.

7 *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.2.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

216-219 Grant pendente lite ... Determination of office

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. As to the procedure relating to administration pending the determination of a probate claim see now para 218.

218 Procedure

TEXT AND NOTES--Replaced. An application under the Supreme Court Act 1981 s 117 (now Senior Courts Act 1981 s 117) for an order for the grant of administration pending the determination of a probate claim should be made by application notice in the probate claim: *Practice Direction--Probate* PD 57 para 8.1. If an order for a grant of administration is made under the Senior Courts Act 1981 s 117 (1) CPR 69.4-69.7 apply as if the administrator were a receiver appointed by the court; (2) if the court allows the administrator remuneration under CPR 69.7, it may make an order under the Senior Courts Act 1981 s 117(3) assigning the remuneration out of the estate of the deceased; and (3) every application relating to the conduct of the administration must be made by application notice in the probate claim: *Practice Direction--Probate* PD 57 para 8.2 (as amended). An order under the Senior Courts Act 1981 s 117 may be made by a master or district judge: *Practice Direction--Probate* PD 57 para 8.3. If an order is made under the Senior Courts Act 1981 s 117 an application for the grant of letters of administration should be made to the Principal Registry of the Family Division, First Avenue House, 42-49 High Holborn, London WC1V 6NP: *Practice Direction--Probate* PD 57 para 8.4. The appointment of an administrator to whom letters of administration are granted following an order under the Senior Courts Act s 117 will cease automatically when a final order in the probate claim is made but will continue pending any appeal: *Practice Direction--Probate* PD 57 para 8.5. For the meaning of probate claim see PARA 277.

219. Determination of office.

The appointment of an administrator to whom letters of administration are granted following an order¹ ceases automatically when a final order in the probate proceedings is made but continues pending any appeal². The administrator may, however, in certain cases be entitled to retain money received by him until his accounts have been brought in and passed³.

¹ le an order under the Supreme Court Act 1981 s 117 (see PARA 216 ante): see *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.5. As to the CPR see PARA 37 note 3 ante.

² *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A para 15.5.

³ *Re Wieland, Wieland v Bird* [1894] P 262.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

216-219 Grant pendente lite ... Determination of office

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. As to the procedure relating to administration pending the determination of a probate claim see now para 218.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vi) Administration pending Suit/220. Administrator's liability.

220. Administrator's liability.

While his functions continue, an administrator pending suit is liable to be sued by a creditor without leave of the court, in the same way as a general administrator¹, and there is no special jurisdiction to stay proceedings against him².

¹ *Re Toleman, Westwood v Booker* [1897] 1 Ch 866. See also *Tichborne v Tichborne* (1870) LR 2 P & D 41. As to the liability of a general administrator see PARA 33 ante.

² *Martin v Toleman* (1897) 77 LT 138.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vii) Miscellaneous Limited Grants/221. Grant to non-trust corporation.

(vii) Miscellaneous Limited Grants

221. Grant to non-trust corporation.

Where a corporate body other than a trust corporation¹ would, if an individual, be entitled to a grant², administration for its use and benefit, limited until further representation is granted, may be granted to its nominee³ or to its lawfully constituted attorney⁴. The nominee or attorney must depose in the oath that the corporate body is not a trust corporation⁵. A copy of the resolution⁶ appointing the nominee or, as the case may be, the power of attorney, sealed by the corporate body or otherwise authenticated to the district judge's⁷ or registrar's⁸ satisfaction, must be lodged with the application⁹. Such administration may not be granted where a corporate body is appointed executor jointly with an individual unless the right of the individual has been cleared off¹⁰.

1 For the meaning of 'trust corporation' see PARA 18 note 4 ante. As to trust corporations see PARA 175 ante.

2 For the meaning of 'grant' see PARA 27 note 7 ante.

3 Where a corporation is entitled as executor it must be established that it has power under its constitution to take a grant through its nominee: see *Practice Direction*[1956] 1 All ER 305, [1956] 1 WLR 127. As to the former practice in appointing a syndic see PARA 18 note 3 ante.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 36(4)(a). See also PARA 18 ante. A foreign corporation appointed executor may appoint an attorney to take a grant for its use and benefit until further representation is granted, it being immaterial whether or not the will has been proved in the court of the domicile unless there is some other person entrusted by the foreign court who has applied in England: *Practice Direction*[1953] 2 All ER 1154 at 1156, [1953] 1 WLR 1237 at 1240.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 36(4)(c).

6 A duly authenticated copy of a resolution passed by the committee or other body most completely representing a corporation, association or public, charitable or private body of persons entitled as beneficiary or creditor is sufficient: *Practice Direction*[1956] 1 All ER 305, [1956] 1 WLR 127.

7 For the meaning of 'district judge' see PARA 27 note 6 ante.

8 For the meaning of 'registrar' see PARA 27 note 7 ante.

9 Non-Contentious Probate Rules 1987, SI 1987/2024, r 36(4)(b) (amended by SI 1991/1876). See also PARA 18 ante.

10 Non-Contentious Probate Rules 1987, SI 1987/2024, r 36(4)(d).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vii) Miscellaneous Limited Grants/222. Grants to unincorporated bodies.

222. Grants to unincorporated bodies.

Where an unincorporated body of persons or association is entitled as beneficiary or creditor, it obtains a grant through its nominee, who must produce an authenticated copy of a resolution appointing him passed by the committee or other body most completely representing it¹.

¹ *Practice Direction* [1956] 1 All ER 305, [1956] 1 WLR 127. As to unincorporated bodies generally see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1101.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vii) Miscellaneous Limited Grants/223. Grant ad colligenda bona.

223. Grant ad colligenda bona.

A grant (known as a grant ad colligenda bona) for getting in and preserving the assets of a deceased person may be made where delay in obtaining the full grant might prove detrimental to the estate¹. The grant may be made even to a stranger connected as an agent or otherwise with the deceased's affairs². Application for an order for a grant of administration ad colligenda bona may be made to a district judge³ or registrar⁴ and must be supported by an affidavit setting out the grounds of the application⁵.

The grant is usually limited to the collection and preservation of the estate, the giving of discharges for debts due to the estate, and the preservation of the assets collected either by investment or by payment into court⁶. The grant may authorise the administrator to renew a lease⁷, to let farms and other portions of the real estate, with power to sell farm stock and implements of husbandry⁸, or the goodwill of a business⁹, to reimburse solicitors for tax and costs, to pay debts and funeral expenses and to pay income in respect of a life interest¹⁰.

1 *Re Clarkington* (1861) 2 Sw & Tr 380; *Re Wyckoff* (1862) 3 Sw & Tr 20; *Re Clore* [1982] Fam 113, [1982] 2 WLR 314; approved in *IRC v Stype Investments (Jersey) Ltd, Re Clore* [1982] Ch 456, [1982] 3 All ER 419, CA (where a grant was made to the Official Solicitor on an application by the Commissioners of Inland Revenue where executors had delayed in applying for probate). Grants ad colligenda bona are to a great extent avoided by application being made under the Supreme Court Act 1981 s 116: see PARA 180 ante.

2 *Re Radnall* (1824) 2 Add 232; *Re Gudolle* (1835), cited in *Re Wyckoff* (1862) 3 Sw & Tr 20 at 22.

3 For the meaning of 'district judge' see PARA 27 note 6 ante.

4 For the meaning of 'registrar' see PARA 27 note 7 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 52(b) (amended by SI 1991/1876). See also Tristram and Coote's Probate Practice (28th Edn) 584-585.

6 The powers conferred on an administrator ad colligenda bona may be extended so as to include, for instance, a power to sell chattels real. As to the administrator's liability for rent in such a case see *Whitehead v Palmer* [1908] 1 KB 151.

7 *Re Clarkington* (1861) 2 Sw & Tr 380.

8 *Re Roberts* [1898] P 149.

9 *Re Schwerdtfeger* (1876) 1 PD 424; *Re Bolton* [1899] P 186.

10 *Re Sanpietro, Re Van Tuyll Van Serooskerken* [1941] P 16, [1940] 4 All ER 482.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act

1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

223 Grant ad colligenda bona

NOTE 5--There is no requirement that the application or grant be made without notice: *Ghafoor v Cliff* [2006] EWHC 825 (Ch), [2006] 2 All ER 1079.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vii) Miscellaneous Limited Grants/224. Grant where will is abroad or mislaid.

224. Grant where will is abroad or mislaid.

A grant may be made in a case where the will of a testator is in a foreign country¹, or where there is believed to have been a will which has been accidentally mislaid or destroyed². The grant is limited in time until the original will or an authenticated copy of it is brought into the registry³.

1 *Re Metcalfe* (1822) 1 Add 343; *Re Brown* (1899) 80 LT 360.

2 *Re Campbell* (1829) 2 Hag Ecc 555; *Re Wright* [1893] P 21.

3 *Re Wright* [1893] P 21; *Re Greig* (1866) LR 1 P & D 72. In *Re Campbell* (1829) 2 Hag Ecc 555, the grant was not so limited.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vii) Miscellaneous Limited Grants/225. Grant ad litem.

225. Grant ad litem.

Administration may be granted ad litem with a view to beginning¹ or carrying on proceedings². The administrator under such a grant sufficiently represents the estate for the purpose of the proceedings, where it is merely desired to bind the estate of a person who, if alive, would have been a necessary party³. Where the object of Chancery proceedings is to administer the estate in respect of which a grant ad litem has been obtained, or to obtain relief involving general accounts and inquiries in respect of the estate, a general administrator is a necessary party to the proceedings⁴.

1 *Woolley and Gordon v Green* (1820) 3 Phillim 314.

2 *Re Dodgson* (1859) 1 Sw & Tr 259; *Day v Thompson, Re Frampton* (1863) 3 Sw & Tr 169. See *Re Byrne* (1910) 44 ILT 98. As to administration pending suit for the purpose of probate proceedings see PARA 216 ante.

3 *Faulkner v Daniel* (1843) 3 Hare 199; *Davis v Chanter* (1848) 2 Ph 545; *Groves v Lane* (1852) 16 Jur 1061; cf *Williams v Allen* (1862) 4 De GF & J 71.

4 *Groves v Lane* (1852) 16 Jur 1061; *Dowdeswell v Dowdeswell* (1878) 9 ChD 294, CA.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vii) Miscellaneous Limited Grants/226. Court's general power to dispense with representatives.

226. Court's general power to dispense with representatives.

Where any person against whom a claim would have lain has died but the cause of action survives, the claim may, if no grant of probate or administration has been made, be brought against the deceased's estate¹. A claim purporting to have been commenced against a person who is dead at its commencement is to be treated as having been commenced against his estate² whether or not a grant of probate or administration was made before its commencement³.

In any such claim, the claimant must, during the period of validity for service of the claim form, apply to the court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made, for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for

the estate⁴. The court may at any stage of the proceedings and on such terms as it thinks just, and either of its own motion or on application, make any such order⁵ and allow such amendments (if any) to be made and make such other order as the court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon⁶. Where no grant of probate or administration has been made, any judgment or order made in the proceedings binds the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings⁷.

Where a party to a claim dies but the cause of action survives, the claim does not abate by reason of the death⁸.

Where in any proceedings it appears to the court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative it may, on the application of any party to the proceedings, proceed in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purposes of the proceedings; and any such order and any judgment or order subsequently given or made in the proceedings binds the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings⁹.

The jurisdiction may be exercised in proceedings by mortgagees¹⁰, but not with a view to making a foreclosure order against a sole defendant's estate¹¹, nor generally to bind the estate of a deceased person who was the only person liable in the action¹². The court may, however, appoint a person to represent the estate of a sole claimant who has died insolvent, to enable the defendant to have someone against whom he may move for dismissal of the action¹³. Money will not be paid out of court to a person appointed to represent the estate, but will be carried over to a separate account¹⁴.

1 CPR Sch 1 RSC Ord 15 r 6A(1); CPR Sch 2 CCR Ord 5 r 8(1). For this purpose a claim brought against 'the personal representatives of AB deceased' is to be treated as having been brought against his estate: CPR Sch 1 RSC Ord 15 r 6A(2); CPR Sch 2 CCR Ord 5 r 8(2). As to the CPR see PARA 37 note 3 ante.

2 Ie in accordance with CPR Sch 1 RSC Ord 15 r 6A(1); CPR Sch 2 CCR Ord 5 r 8(1) (see the text to note 1 supra): see CPR Sch 1 RSC Ord 15 r 6A(3); CPR Sch 2 CCR Ord 5 r 8(3).

3 CPR Sch 1 RSC Ord 15 r 6A(3); CPR Sch 2 CCR Ord 5 r 8(3).

4 CPR Sch 1 RSC Ord 15 r 6A(4)(a); CPR Sch 2 CCR Ord 5 r 8(4)(a). Failure to comply with this requirement may invalidate service on the solicitors for a deceased person: *Foster v Turnbull* (1990) Times, 22 May, CA.

5 Ie as is mentioned in CPR Sch 1 RSC Ord 15 r 6A(4)(a); CPR Sch 2 CCR Ord 5 r 8(4)(a) (see the text to note 4 supra): see CPR Sch 1 RSC Ord 15 r 6A(4)(b); CPR Sch 2 CCR Ord 5 r 8(4)(b).

6 CPR Sch 1 RSC Ord 15 r 6A(4)(b); CPR Sch 2 CCR Ord 5 r 8(4)(b). Before making any order the court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit: CPR Sch 1 RSC Ord 15 r 6A(5); CPR Sch 2 CCR Ord 5 r 8(5). Where an order is made under CPR Sch 1 RSC Ord 15 r 6A(4) appointing the Official Solicitor to represent the deceased's estate, the appointment is limited to his accepting service of the claim form by which the proceedings were begun unless, either on making such an order or on a subsequent application, the court with the consent of the Official Solicitor, directs that the appointment is to extend to taking further steps in the proceedings: CPR Sch 1 RSC Ord 15 r 6A(5A). As to the Official Solicitor see COURTS. Where an order is made in the High Court, CPR Sch 1 RSC Ord 15 rr 7(4), 8(3), (4) apply as if the order had been made under r 7 on the application of the claimant: CPR Sch 1 RSC Ord 15 r 6A(6). Where an order is made in the county court, the person against whom the proceedings are to be carried on must be served with a copy of the order, together with a copy of the application notice if any: CPR Sch 2 CCR Ord 5 r 8(6).

7 CPR Sch 1 RSC Ord 15 r 6A(7); CPR Sch 2 CCR Ord 5 r 8(7).

8 CPR Sch 1 RSC Ord 15 r 7(1). As to changes of parties generally see CPR 19.3; and CIVIL PROCEDURE.

9 CPR Sch 1 RSC Ord 15 r 15(1). Before making any order the court may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate as it thinks fit: CPR Sch 1 RSC Ord 15 r 15(2).

There is no power to appoint a person against his will: *Pratt v London Passenger Transport Board* [1937] 1 All ER 473, CA (Official Solicitor). See also *Re Curtis and Betts* [1887] WN 126, CA; *Prince of Wales etc Association Co v Palmer* (1858) 25 Beav 605 at 606; *Hill v Bonner* (1858) 26 Beav 372; *Re Raphael, Warburg v Raphael* (1916) 61 Sol Jo 99 (Public Trustee unwilling). Cf *Re Deans, Westminster Bank Ltd v Official Solicitor* [1954] 1 All ER 496, [1954] 1 WLR 332 (plaintiffs seeking to enforce guarantee against intestate's estate; estate vested in President (see PARA 34 ante); application for appointment of Official Solicitor to represent estate and for vesting order in respect of property subject to guarantee in favour of Official Solicitor: the President is not a trustee, and in any event the court would not press the Official Solicitor to consent, as the plaintiffs could apply for a grant of representation of the deceased's estate).

When appointed to represent the deceased defendant the Official Solicitor is entitled to substitute himself for the solicitors on the record as acting for the deceased: *Watts v Official Solicitor* [1936] 1 All ER 249, CA. When in a personal injury action it is desired to serve a third party notice on the representative of the estate of a deceased person, the court has power to make an appointment under CPR Sch 1 RSC Ord 15 r 15, even though the deceased was not a party to the original action: see *Lean v Alston* [1947] KB 467, [1947] 1 All ER 261, CA. In addition to the power conferred by this rule the court under its discretionary powers (see PARA 180 ante) may grant letters of administration to the Official Solicitor limited to his defending a proposed action against the estate of a deceased person: *Re Knight* [1939] 3 All ER 928.

10 *Curtius v Caledonian Fire and Life Insurance Co* (1881) 19 ChD 534, CA; *Peat v Gott* [1885] WN 46; *Neal v Barrett* [1887] WN 88; *Scott v Streatham and General Estates Co Ltd* [1891] WN 153. See also MORTGAGE vol 77 (2010) PARA 530 et seq.

11 *Aylward v Lewis* [1891] 2 Ch 81.

12 *Re Curtis and Betts* [1887] WN 126, CA.

13 *Wingrove v Thompson* (1879) 11 ChD 419.

14 *Rawlins v McMahon* (1852) 1 Drew 225; *Byam v Sutton* (1855) 19 Beav 646.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

226 Court's general power to dispense with representatives

TEXT AND NOTES--CPR Sch 1 RSC Ord 15 revoked: SI 2002/2058.

TEXT AND NOTES 1-9--CPR Sch 1 RSC Ord 15 rr 6A, 7, 15, Sch 2 CCR Ord 5 r 8 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(5) SPECIAL AND LIMITED GRANTS OF ADMINISTRATION/(vii) Miscellaneous Limited Grants/227. Grant limited to specific property.

227. Grant limited to specific property.

A grant may be made to a beneficiary limited to the trust fund where the trustee in whose name the fund stands is dead and without a personal representative¹. If the trustee died testate his will should be annexed to the grant². An application for a grant of administration or probate³ limited to part of the estate may be made to a district judge⁴ or registrar⁵ and must be supported by an affidavit setting out the grounds of the application⁶, and stating: (1) whether the deceased's estate is known to be insolvent⁷; and (2) showing how any person entitled to a grant in respect of the whole estate in priority to the applicant has been cleared off⁸. Where several persons are interested in the trust fund the grant is limited to the applicant's interest unless the others consent to the grant extending to their respective interests⁹. The person entitled to administer the trust fund should be cited¹⁰.

1 *Re Ratcliffe* [1899] P 110; *Re Agnese* [1900] P 60; *Murray v Champernowne* [1901] 2 IR 232. For the power to grant representation in respect of any part of the estate of a deceased person, limited in any way the court thinks fit see the Supreme Court Act 1981 s 113; and PARA 12 ante. See further *Re Newsham* [1967] P 230, [1966] 3 All ER 681. See also PARA 228 post.

2 *Re Butler* [1898] P 9.

3 As to limited probates see PARA 148 et seq ante.

4 For the meaning of 'district judge' see PARA 27 note 6 ante.

5 For the meaning of 'registrar' see PARA 27 note 7 ante.

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 51 (amended by SI 1991/1876). The application is made ex parte: see PARA 99 ante.

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 51(a).

8 Ibid r 51(b).

9 *Pegg v Chamberlain* (1860) 1 Sw & Tr 527.

10 *Pegg v Chamberlain* (1860) 1 Sw & Tr 527; *Re Kingwell* (1899) 81 LT 461.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

228. Examples of limited grant.

A grant may be made limited to a legacy¹, to a fund appropriated for the payment of a legacy², to property the subject of a mortgage³, to the appointment of a new trustee and the vesting of the trust property in him⁴, and to bringing particular actions⁵.

A limited grant should not, however, be made to a person entitled to a general grant unless a very strong reason is given, and cannot be made except under the court's discretion⁶. Although the court may, by statute, grant probate or administration in respect of the real estate or any part of it either separately or together with probate or administration of the personal estate⁷, this does not allow a separate grant of part only of the personal estate⁸ to be made to a person entitled to a general grant. It seems that such a person, if unwilling to take a general grant, will be passed over under the discretionary power⁹.

1 *Re Steadman* (1828) 2 Hag Ecc 59; *Re Baldwin* [1903] P 61.

2 *Re Biou, Indigent Blind School and Westminster Hospital v Flack* (1843) 3 Curt 739.

3 *Re Lowe* (1898) 78 LT 566; *Re Kingwell* (1899) 81 LT 461.

4 *Re Berry* [1907] 2 IR 209.

5 *Re Williams* (1859) 23 JP 519; *Re Winstone* [1898] P 143; *Re Byrne* (1910) 44 ILT 98.

6 *Re Lady Somerset* (1867) LR 1 P & D 350; *Re Watts* (1860) 1 Sw & Tr 538.

7 *le* under the Supreme Court Act 1981 s 113: see PARA 12 ante.

8 *Re Newsham* [1967] P 230, [1966] 3 All ER 681 (court's inherent jurisdiction was not argued and the position under the statute was conceded, so the decision appears to be obiter on an ex parte application).

9 See *Re Newsham* [1967] P 230 at 233, [1966] 3 All ER 681 at 682 per Karminski J. As to the court's discretionary power see PARA 180 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/229. Special executors.

(6) SETTLED LAND GRANTS

229. Special executors.

A testator may appoint, and in default of express appointment is deemed to have appointed¹, as his special executors in regard to settled land² the persons, if any, who are at his death the trustees of the settlement³, and probate may be granted to such trustees specially limited to the settled land⁴. The testator may appoint other persons, either with or without such trustees or any of them, to be his general executors in regard to his other property and assets⁵.

1 As to the derivation of the title of an executor so deemed to have been appointed see PARA 29 ante.

2 For this purpose, 'settled land' means land vested in the testator which was settled previously to his death and not by his will: Administration of Estates Act 1925 s 22(1). In general in that Act 'settled land' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 680): Administration of Estates Act 1925 s 55(1)(xxiv). For the meaning of 'will' see PARA 3 note 1 ante. Subject to certain exceptions, new settlements created on or after 1 January 1997 are not settlements for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

Where the deceased dies wholly intestate, administration is to be granted, as regards land settled before his death, to the trustees, if any, of the settlement if willing to act: see PARA 233 post.

3 'Trustees of the settlement' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 750): Administration of Estates Act 1925 s 55(1)(xxiv).

4 Ibid s 22(1). As from 14 October 1991, the special executors are entitled to a grant of administration, rather than probate: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29 (as substituted); and PARA 230 post.

5 Administration of Estates Act 1925 s 22(2). For the meaning of 'property' see PARA 4 note 4 ante. Section 22, with its special definition of 'settled land' in s 22(1) (see note 2 supra), does not apply where, on the death of the tenant for life, the settlement comes to an end: *Re Bridgett and Hayes' Contract* [1928] Ch 163. See also the definition of 'settled land' in the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29(1) (as substituted); and PARA 230 note 1 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/230. Grants in respect of settled land.

230. Grants in respect of settled land.

The order of priority for a grant of administration limited to settled land¹ is as follows: (1) the special executors²; (2) the trustees of the settlement at the time of the application for the grant³; and (3) the personal representatives of the deceased⁴. Where there is settled land and a grant is made in respect of the free estate only, the grant must expressly exclude the settled land⁵.

1 In the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29 (as substituted), 'settled land' means land vested in the deceased which was settled prior to his death and not by his will and which remained settled land notwithstanding his death: r 29(1) (r 29 substituted by SI 1991/1876). See also PARA 229 note 2 ante. As to settled land generally see SETTLEMENTS vol 42 (Reissue) PARA 675 et seq.

2 Non-Contentious Probate Rules 1987, SI 1987/2024, r 29(2)(i) (as substituted: see note 1 supra). The special executors are those in regard to settled land constituted by the Administration of Estates Act 1925 s 22 (see PARA 229 ante): see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29(2)(i) (as so substituted).

3 Ibid r 29(2)(ii) (as substituted: see note 1 supra).

4 Ibid r 29(2)(iii) (as substituted: see note 1 supra).

5 Ibid r 29(3) (as substituted: see note 1 supra).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/231. Devolution of legal estate in settled land.

231. Devolution of legal estate in settled land.

In a properly constituted settlement of land¹, the legal estate is vested in the person or persons entitled by statute to exercise the powers of a tenant for life². Where there is more than one such person, the legal estate on the death of one passes by survivorship to the survivor or survivors without any grant of representation³. On the death of a sole or last survivor, the legal estate passes as an ordinary trust estate to his general personal representative⁴. On the death of a sole or sole surviving tenant for life, the legal estate passes to his general or special personal representative⁵.

There is no absolute necessity that a settlement should be properly constituted. The legal estate may be outstanding in a settlor⁶ or a personal representative, and in such cases, on the settlor's death, it will pass to his personal representative or on the death of a personal

representative it will pass according to the chain of representation or be made the subject of a grant de bonis non⁷.

1 See the Settled Land Act 1925 ss 4, 6; and SETTLEMENTS vol 42 (Reissue) PARA 688 et seq. See also PARA 229 note 2 ante.

2 As to these persons see *ibid* ss 19-26 (ss 20, 25 as amended); and SETTLEMENTS vol 42 (Reissue) PARA 761 et seq.

3 See the Administration of Estates Act 1925 s 3(4); and PARA 366 post.

4 See the Settled Land Act 1925 s 7(1); and SETTLEMENTS vol 42 (Reissue) PARA 698. It is submitted that any continuing settled land vested in a statutory owner vests, under the general grant to his free estate, in his general personal representatives and can be dealt with under the Trustee Act 1925 s 18 (see PARA 368 post). It is not quite clear that such a case is not within the Administration of Estates Act 1925 s 22 (see PARA 229 ante), but if it is there can be no special executors as the deceased is the last trustee. Any special grant would have to be made to new trustees, and in practically every case, in such circumstances, these would have to be appointed by the court. In view of these matters it is clear that special personal representatives would be cleared off in favour of the general personal representatives, and it seems better that the property should pass as a trust estate.

5 As to the rules governing this process see PARAS 232-237 post.

6 This might be the case in a settlement constituted by deed or declaration of trust: see SETTLEMENTS vol 42 (Reissue) PARA 612.

7 As to the chain of representation see PARA 47 et seq ante. As to grants de bonis non see PARA 201 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/232. When a settled land grant is necessary.

232. When a settled land grant is necessary.

The necessity for a settled land grant only arises when the legal estate was vested in a sole or sole surviving tenant for life¹, and in such cases only when the land continues to be settled land after his death². Where the land ceases to be settled land on the death of the tenant for life³ it passes under the ordinary general grant of the free estate to the general personal representative⁴.

1 See PARA 231 note 2 ante.

2 It was originally thought that the land remained technically settled land until vested in absolute owners or trustees for sale. It was held, however, in *Re Bridgett and Hayes' Contract* [1928] Ch 163, that it ceased to be such on the death of the tenant for life. This point is only the subject of a dictum in *Re Bridgett and Hayes' Contract* supra, but the dictum was adopted in *Re Bordass* [1929] P 107, and has always been acted on by the probate registry. Where, however, after ceasing to be settled land under one settlement, the property immediately becomes settled land under another settlement, a settled land grant is necessary: *Re Taylor* [1929] P 260.

3 As to the duration of settlements see the Settled Land Act 1925 s 3 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 708.

4 *Re Bridgett and Hayes' Contract* [1928] Ch 163.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/233. Settled land grants on death of tenant for life.

233. Settled land grants on death of tenant for life.

Several possibilities arise where, after the death of the tenant for life, land continues to be settled land. If the tenant for life dies wholly intestate he is not deemed to have appointed special executors¹ and a limited grant of administration is made to the trustees of the settlement, if willing to act², who may have been appointed trustees before or after the death, under the court's discretionary power³.

If the tenant for life dies testate⁴ he will have appointed or will be deemed to have appointed as his special executors the persons, if any, who are at his death the trustees of the settlement⁵ and a limited grant of administration is made to these trustees⁶. It is not clear how far a testator is deemed to have appointed a sole trustee as special executor, but assuming that he is so deemed there is no objection to a grant (being one of administration) to one trustee⁷. If there are no trustees of the settlement at the testator's death and if the settlement was originally created by will or arose on an intestacy, then the settlor's personal representative is by statute⁸ a trustee of the settled land and is entitled to a grant of limited administration⁹. If he is a sole personal representative not being a trust corporation he must appoint an additional trustee to act with him¹⁰.

Trustees appointed after the death of the tenant for life are not executors under the Settled Land Act 1925¹¹, and are therefore only entitled to a grant of administration with the will annexed¹², limited to the land included in the settlement¹³.

- 1 The Administration of Estates Act 1925 s 22(1) refers only to a testator, but it seems that for this purpose any provable will is sufficient, even if the appointment fails or is renounced. The term has no statutory definition. See PARA 229 ante.
- 2 See the Supreme Court Act 1981 s 113; and PARA 12 ante.
- 3 See PARA 180 ante. See also the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29(3) (as substituted); and PARA 230 ante.
- 4 See note 1 supra.
- 5 See the Administration of Estates Act 1925 s 22(1); and PARA 229 ante. For the meaning of 'trustees of the settlement' see PARA 229 note 3 ante. For this provision to operate there must be a will, and trustees of the settlement at the death of the tenant for life, and the settled land must have been vested in the tenant for life. Where settled land is outstanding in a personal representative or a settlor, it falls to be dealt with on the death of those persons and not on the death of the tenant for life. Where the settlor is the tenant for life and no vesting deed has been executed, it is conceived that s 22 applies, and a special grant or the clearing off of the persons entitled to such grant is required. A similar position arises if land subject to an annuity is vested in the person beneficially entitled to the land subject to the annuity, and it is conceived that the rule as to a special grant applies and the position is not altered by the Law of Property (Amendment) Act 1926 s 1 (see SETTLEMENTS vol 42 (Reissue) PARA 703). See also PARA 229 ante.
- 6 As to limited grants see PARA 221 et seq ante.
- 7 Where there are different trustees of different settlements of which the deceased was the tenant for life, the grant to each set of trustees is limited to the land included in the particular settlement.
- 8 Ie by virtue of the Settled Land Act 1925 s 30(3); see SETTLEMENTS vol 42 (Reissue) PARA 751.
- 9 *Re Gibbings* [1928] P 28.
- 10 See the Settled Land Act 1925 s 30(3); and SETTLEMENTS vol 42 (Reissue) PARA 751. Subsequent appointments and discharges are made under the Trustee Act 1925 s 36 (as amended), by virtue of s 64(1): *Re Dark, Glover v Dark* [1954] Ch 291, [1954] 1 All ER 681.
- 11 Such trustees could not be deemed to be appointed by the tenant for life as special executors within the meaning of the Administration of Estates Act 1925 s 22: see PARA 229 ante.
- 12 This is with the will of the tenant for life annexed, and such a grant can only be made where the tenant for life left an effective will. As to administration with the will annexed see PARA 196 et seq ante.
- 13 See notes 2-3 supra.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/234. General grants including settled land.

234. General grants including settled land.

Special personal representatives may be cleared off by death or renunciation in the same way as other persons entitled to a grant¹, and then a general grant of representation, including settled land, is issued to the general personal representative². Such a general grant may also be issued where the persons entitled to the special grant are the same as those entitled to the general grant. Before such grants can issue, however, all persons entitled to a special grant must be cleared off, and it must be sworn that there is no settled land other than that disclosed. In special cases the court has power to and will make a grant without clearing off all the persons who might be entitled to a special grant³.

¹ Such renunciation is allowed in practice: see the Administration of Estates Act 1925 s 23(1); and PARA 236 post.

² Ibid s 23(1) appears to assume that continuing settled land vests in a general personal representative under a general grant: see PARA 236 post. It seems that, where such a grant has been made, the personal representatives can validly convey under it to a purchaser, even though it does not contain the words 'including settled land': see *Re Bridgett and Hayes' Contract* [1928] Ch 163. See also the Law of Property Act 1925 s 204 (see PARA 65 ante); the Administration of Estates Act 1925 s 37 (see PARA 267 post); and cf the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29(3) (as substituted) (see PARA 230 ante). However, if the settlement continues and there are trustees of it at the death the general grant would not be appropriate: see *Re Taylor* [1929] P 260. See also 95 L Jo 299-300; Potter (ed) 'Rents in the Settled Land Curtain' [1946] 10 Conveyancer and Property Lawyer 135; 'The Settled Land Act Curtain' [1946] 201 LT Jo 307; Potter (ed) 'Dispositions of Settled Land by Personal Representatives' [1946] 11 Conveyancer and Property Lawyer 91, 159.

³ *Re Powell* [1935] P 114. See the Supreme Court Act 1981 s 113; and PARA 12 ante. See also PARA 227 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/235. Limited grants where the land ceases to be settled.

235. Limited grants where the land ceases to be settled.

Where settled land ceases to be such on the death of the tenant for life and the Treasury Solicitor is entitled to a general grant of representation to the estate¹, the court may except the land from the general grant and make a limited grant to the remainderman² or other person beneficially entitled³. Similar grants have been made after citation⁴ and without citation of the next of kin⁵, or where the persons otherwise entitled to a grant are cleared off by renunciation⁶.

1 See under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 22(2): see PARAS 159, 170 ante. See also *Re Mortifee* [1948] P 274. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

2 *Re Dalley* (1926) 136 LT 223 (a case decided before the ruling in *Re Bridgett and Hayes' Contract* [1928] Ch 163 (see PARA 232 ante)). As to limited grants see PARA 221 et seq ante.

3 *Re Mortifee* [1948] P 274.

4 See *Re Bordass* [1929] P 107. As to citations see PARA 91 ante.

5 See *Re Birch* [1929] P 164.

6 As to renunciation see PARA 236 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/236. Renunciation and revocation.

236. Renunciation and revocation.

Where settled land¹ becomes vested in a personal representative², not being a trustee of the settlement³, upon trust to convey the land⁴ to or assent to the vesting of it in the tenant for life or statutory owner⁵ in order to give effect to a settlement⁶ created before the death of the deceased and not by his will⁷, or would on the grant of representation⁸ to him, have become so vested, such representative may⁹: (1) before representation has been granted, renounce his office in regard only to the settled land without renouncing it in regard to other property¹⁰; or (2) after representation has been granted, apply to the court for revocation of the grant in regard to the settled land without applying in regard to other property¹¹.

Whether such renunciation or revocation is made or not, the trustees of the settlement, or any person beneficially interested under it, may apply to the High Court for an order appointing a special or additional personal representative in respect of the settled land¹². When so

appointed, any such personal representative is in the same position as if representation had originally been granted to him alone in place of any original personal representative, or to him jointly with the original personal representative, as the case may be, limited to the settled land, but without prejudice to any previous acts and dealings of the personal representative originally constituted or the effect of notices given to him¹³.

The court may make such an order subject to such security, if any, being given by or on behalf of the special or additional personal representative, as the court may direct, and must, unless the court considers that special considerations apply, appoint such persons as may be necessary to secure that the persons to act as representatives in respect of the settled land, if willing to act, are the same persons as are the trustees of the settlement¹⁴. Rules of court may be made for prescribing for all matters required for giving effect to the above provisions¹⁵.

The grant may be limited in any way the court thinks fit¹⁶.

1 For the meaning of 'settled land' see PARA 229 note 2 ante.

2 For the meaning of 'personal representative' see PARA 4 ante.

3 For the meaning of 'trustee of the settlement' see PARA 229 note 3 ante.

4 For the meaning of 'land' see PARA 364 note 1 post.

5 'Tenant for life' and 'statutory owner' have the same meanings as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARAS 671, 766): Administration of Estates Act 1925 s 55(1)(xxiv).

6 'Settlement' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 678): Administration of Estates Act 1925 s 55(1)(xxiv).

7 For the meaning of 'will' see PARA 3 note 1 ante.

8 For the meaning of 'representation' see PARA 4 note 2 ante.

9 Administration of Estates Act 1925 s 23(1).

10 Ibid s 23(1)(a). See also PARAS 25 ante, 256 post. For the meaning of 'property' see PARA 4 note 4 ante.

11 Ibid s 23(1)(b).

12 Ibid s 23(2). In *Re Clifton* [1931] P 222, one of two special executors became mentally disordered, and the court revoked the grant and made a new grant to the same executor with power to the other to come in, and appointed a special additional personal representative. It is not clear why the additional personal representative was appointed, as the sole executor could have acted alone.

The representative appointed may be ordered to give security: see the Administration of Estates Act 1925 s 23(3) (see the text and note 14 infra). The person applying for the appointment of a special or additional personal representative must give notice of the application to the principal registry of the Family Division of the High Court in the manner prescribed: s 23(4) (amended by the Administration of Justice Act 1970 s 1(6), Sch 2 para 3). This occurs after application in Chancery Chambers: see *Practice Direction* [1928] WN 225. As to the prescribed manner see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 67 (as amended); and PARA 100 ante.

13 Administration of Estates Act 1925 s 23(2).

14 Ibid s 23(3) (amended by the Administration of Justice Act 1970 Sch 2 para 3). An office copy of the order when made must be furnished to the principal registry of the Family Division of the High Court for entry, and a memorandum of the order must be indorsed on the probate or administration: Administration of Estates Act 1925 s 23(3) (as so amended).

15 Ibid s 23(5). In particular, rules may be made for: (1) notice of any application being given to the proper officer; (2) production of orders, probates, and administration to the registry; (3) the indorsement on a probate or administration of a memorandum of an order, subject or not to any exceptions; (4) the manner in which the costs are to be borne; (5) protecting purchasers and trustees and other persons in a fiduciary position, dealing in good faith with or giving notices to a personal representative before notice of any order has been indorsed on

the probate or administration or a pending action has been registered in respect of the proceedings: s 23(5). For the rules of court see the Non-Contentious Probate Rules 1987, SI 1987/2024.

16 See the Supreme Court Act 1981 s 113; and PARA 12 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(6) SETTLED LAND GRANTS/237. Disposing of settled land.

237. Disposing of settled land.

The special personal representatives¹ may dispose of the settled land without the concurrence of the general personal representatives, who may likewise dispose of the other property² and assets of the deceased without the concurrence of the special personal representatives³.

1 For these purposes, the expression 'special personal representatives' means the representatives appointed to act for the purposes of settled land and includes any original personal representative who is to act with an additional personal representative for those purposes: Administration of Estates Act 1925 s 24(2). For the meaning of 'settled land' see PARA 229 note 2 ante. For the meaning of 'personal representative' see PARA 4 ante. As to the appointment of special executors see PARA 229 ante.

2 For the meaning of 'property' see PARA 4 note 4 ante.

3 Administration of Estates Act 1925 s 24(1).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(i) Scottish Confirmations and Northern Irish Grants/238. Recognition and evidence.

(7) RECOGNITION AND RESEALING

(i) Scottish Confirmations and Northern Irish Grants

238. Recognition and evidence.

Statutory provision has been made for the mutual recognition of grants between the courts of England and Wales, and of Scotland and Northern Ireland¹. A document purporting to be a confirmation, additional confirmation or certificate of confirmation given under the seal of office of any commissariat in Scotland, and a document purporting to be a grant of probate or of letters of administration issued under the seal of the High Court in Northern Ireland or of the principal or district probate registry there, are, except where the contrary is proved, to be taken to be such without further proof². Duplicates and copies are similarly admissible if they purport to be sealed³. There is similar provision for the admission in Scotland and Northern Ireland of English grants⁴.

1 See the Administration of Estates Act 1971 ss 1-3; and PARAS 239-242 post. Grants should normally be extracted in that part of the United Kingdom in which the deceased was domiciled and it will then (unless any special limitation is included) make title to the whole of the United Kingdom assets, but if the circumstances make it necessary application may be made for a grant in England and Wales although the deceased died domiciled in Scotland or Northern Ireland: see *Practice Direction* [1971] 1 WLR 1790. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

2 Administration of Estates Act 1971 s 4(1)(a), (2)(a).

3 See *ibid* s 4(1)(b), (2)(b).

4 See *ibid* s 4(3).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(i) Scottish Confirmations and Northern Irish Grants/239. Scottish confirmations.

239. Scottish confirmations.

Where a person dies domiciled in Scotland, a confirmation¹ granted in respect of all or part of his estate and noting his Scottish domicile², and a certificate of confirmation noting his Scottish domicile and relating to one or more items of his estate³ are treated, without being resealed, for the purposes of English law as a grant of representation to the executors named in the confirmation or certificate in respect of the property of the deceased of which according to the terms of the confirmation they are executors or, as the case may be, in respect of the items specified in the certificate of confirmation⁴. Such confirmation or certificate of confirmation is treated as a grant of probate where it appears from the confirmation or certificate that the executors named in it are executors nominate⁵, and, in any other case, as a grant of administration⁶, but the provisions as to the devolution of the office of executor constituting the chain of representation do not apply in either case⁷. It may contain or have appended to it, signed by the sheriff clerk, a note or statement of property in England and Wales or Northern Ireland held by the deceased in trust, being a note or statement which has been set forth in any inventory recorded in the books of the court⁸. Property specified in the note or statement is then treated in English law in the same way as property comprised in the confirmation or certificate⁹. Real estate in England or Wales may be included in the inventory of the estate of a person who dies domiciled in Scotland¹⁰.

1 A 'confirmation' is in Scottish law equivalent to a grant whether of probate or administration. 'Confirmation' includes an additional confirmation; and 'executors' in relation to a confirmation or certificate of confirmation is to be construed according to Scottish law: Administration of Estates Act 1971 s 1(7).

2 Ibid s 1(1)(a). As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

3 Ibid s 1(1)(b).

4 Ibid s 1(1). As to the reciprocal arrangement whereby English and Northern Irish grants are recognised in Scotland see s 3; and PARA 241 post.

5 Ibid s 1(2)(a).

6 Ibid s 1(2)(b).

7 See ibid s 1(3). As to the chain of representation see PARA 47 et seq ante.

8 See ibid s 5(1).

9 See ibid s 5(2).

10 See ibid s 6.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act

1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(i) Scottish Confirmations and Northern Irish Grants/240. Northern Irish grants.

240. Northern Irish grants.

Where a person dies domiciled in Northern Ireland a grant of probate of his will, or letters of administration in respect of his estate (or any part of it) made by the High Court in Northern Ireland and noting his domicile there is treated in English law, without being resealed, as if it had been originally made by the High Court in England and Wales¹.

¹ Administration of Estates Act 1971 s 1(4). The High Court in Northern Ireland has all the jurisdiction formerly exercised by the High Court of Justice of Ireland, which included probate jurisdiction: *Re Gault* [1922] P 195. As to the reciprocal arrangement by which English grants and Scottish confirmations are recognised in Northern Ireland see the Administration of Estates Act 1971 s 2; and PARA 241 post. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(i) Scottish Confirmations and Northern Irish Grants/241. English grants.

241. English grants.

Where the deceased died domiciled in England and Wales, a grant of probate of his will or letters of administration in respect of his estate (or any part of it) made by the High Court in England and Wales, and noting his domicile there, is, without being resealed, of the same force and effect in relation to property in Scotland as a Scottish confirmation given to the executor or administrator¹, and is treated for the purposes of the law of Northern Ireland as if it had been made by the High Court in Northern Ireland².

1 Administration of Estates Act 1971 s 3(1). In the case of a person who died domiciled in Northern Ireland, the same applies to a Northern Irish grant: see s 3(1). As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq. For the meaning of 'confirmation' see PARA 239 note 1 ante.

2 Ibid s 2(1). In the case of a person who died domiciled in Scotland, a Scottish confirmation or certificate of confirmation is treated as being a grant of probate where it appears that the executors are executors nominate, and in any other case as a grant of letters of administration, for the purposes of the law of Northern Ireland: see s 2(2), (3).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(i) Scottish Confirmations and Northern Irish Grants/242. Effect of recognition.

242. Effect of recognition.

The foregoing provisions for the recognition of confirmations and grants¹ apply after 1 January 1972 to confirmations and grants made before that date so that resealing is no longer necessary in such cases even where the confirmation or grant was made many years before the Administration of Estates Act 1971². In such cases the relevant provision has effect as if it had come into force immediately before the grant was made³. However, a person who is a personal representative according to English law only by virtue of that Act may not be required to deliver up his grant to the High Court⁴.

1 See PARAS 238-241 ante. For the meaning of 'confirmation' see PARA 239 note 1 ante.

2 See the Administration of Estates Act 1971 ss 1(6), 2(5), 3(2).

3 See ibid s 1(6); but cf ss 2(5), 3(2).

4 Ibid s 1(5), excluding the application of the Administration of Estates Act 1925 s 25(c) (as substituted) (see PARA 256 post).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/243. General effect of resealing.

(ii) Sealing of Commonwealth and Colonial Grants

243. General effect of resealing.

The resealing in the English court of grants of probate or letters of administration issued in the Republic of Ireland (but only in respect of grants issued before 1 April 1923)¹, and of grants issued in many Commonwealth countries², is to give them the similar force and effect and the same operation in England as though they were originally granted there, but the date of the grant for purposes of English law is the date of resealing and not the date of the original grant³.

¹ See PARA 244 post.

² See PARA 245 post. As to changes of title and cessation of dominion status see COMMONWEALTHvol 13 (2009) PARA 701 et seq.

³ *Burns v Campbell* [1952] 1 KB 15, [1951] 2 All ER 965, CA. As to the duties imposed on the grantee see PARA 247 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/244. Grants from the Republic of Ireland.

244. Grants from the Republic of Ireland.

Grants issued in the Republic of Ireland on or after 1 April 1923 may not be resealed in England, even if the death occurred before that date; and grants issued in England on or after that date may not be transmitted to the Republic of Ireland for resealing there, even if the death occurred before that date¹.

There is no exclusive jurisdiction as to probate in the case of a deceased person leaving property in two or more states, and the English court may make an original grant in respect of property situate in England if the relative Irish grant made in respect of property in Ireland has not already been resealed here².

1 President's Direction, 17 March 1925. The Republic of Ireland ceased on 18 April 1949 to be part of the Crown's dominions: see COMMONWEALTH vol 13 (2009) PARA 728.

2 *Re Millar, Irwin v Caruth* [1916] P 23.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/245. Commonwealth and colonial grants.

245. Commonwealth and colonial grants.

Only grants issued in the territories to which the Colonial Probates Act 1892 has been applied by Order in Council under the power conferred by the Act and the Colonial Probates (Protected States and Mandated Territories) Act 1927 may be resealed in England. The Colonial Probates Act 1892 provides for the resealing by the English court¹ of grants² (including grants de bonis non)³ made by the court of any British possession⁴ not forming part of the United Kingdom, to which the Act has been applied by Order in Council⁵.

The Act also applies to grants made by any British court having jurisdiction in any foreign country in pursuance of an Order in Council whether made under any Act or otherwise⁶. If a grant made by a court in such a country is produced to, and a copy of it is deposited with, the English court, the grant may be sealed with the seal of the English court and then has the same force and effect as if granted by that court⁷.

1 As to the practice see PARA 249 post. Formerly the grantee of probate in a colony where the deceased was domiciled had to obtain a grant in England with the will annexed: *Re Earl* (1867) LR 1 P & D 450.

2 le any instrument having in a British possession the same effect which under English law is given to probate and letters of administration. As to the practice on the resealing of an election to administer (eg as obtained in New Zealand) or similar document having the same effect as a grant see *Practice Direction* (1982) 126 Sol Jo 176.

3 *Re Smith* [1904] P 114. As to grants de bonis non see PARA 201 ante.

4 The Colonial Probates Act 1892 has been extended so as to be applicable by Order in Council to protected and trust territories: see the Colonial Probates (Protected States and Mandated Territories) Act 1927 s 1. It applies in relation to the Hong Kong Special Administrative Region of the People's Republic of China, following the reversion of Hong Kong to Chinese rule: see the Colonial Probates Act 1892 s 1A (added by the Hong Kong (Colonial Probates Act) Order 1997, SI 1997/1572, art 2).

5 See the Colonial Probates Act 1892 ss 1, 4. As to the territories to which the Act has been applied see PARA 246 post.

6 See *ibid* ss 3, 6. The Act may also be extended by Order in Council to foreign countries in which for the time being Her Majesty has jurisdiction, by the joint effect of the Foreign Jurisdiction Act 1890 s 5, Sch 1, and the Foreign Jurisdiction Act 1913 s 1.

7 Colonial Probates Act 1892 s 2(1) (amended by the Finance Act 1975 s 52(1), Sch 12 paras 2,4; and by the Supreme Court Act 1981 ss 152(1), 153(4), Sch 5), which is expressed to be subject to the Supreme Court Act 1981 s 109 (as amended) (see PARA 131 ante). As to requirements for resealing see PARA 248 post. Rules of court may be made for regulating the procedure and practice, including fees and costs, in courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which the Colonial Probates Act 1892 applies: s 2(5).

The court must, before sealing a probate or letters of administration under s 2 (as amended), be satisfied in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which letters of administration relate, and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person: s 2(2) (amended by the Finance Act 1975 ss 52(2), 59(5), Sch 13 Pt I). As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq. The court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom. These requirements apply to the resealing by the High Court of grants made by the British court in a foreign country in the same way as they apply to grants made in a country or territory to which the Colonial Probates Act 1892 applies: Administration of Estates Act 1971 s 11(7).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/246. Countries to which the Colonial Probates Act 1892 applies.

246. Countries to which the Colonial Probates Act 1892 applies.

The Colonial Probates Act 1892 was originally applied by a series of Orders in Council which have been consolidated in the Colonial Probates Act Application Order 1965¹. Grants may be resealed by the English court if made in the following countries and territories: Aden², Alberta, Antigua, Australian Capital Territory, Bahamas, Barbados, Belize³, Bermuda, Botswana⁴, British Antarctic Territory, British Columbia, British Solomon Islands Protectorate, British Sovereign Base Areas in Cyprus, Brunei, Cayman Islands, Christmas Island (Australian), Cocos (Keeling) Islands, Cyprus (Republic), Dominica, Falkland Islands Colony, Falkland Islands Dependencies, Fiji, Gambia, Ghana, Gibraltar, Grenada, Guyana⁵, Hong Kong⁶, Jamaica, Kenya, Kiribati⁷, Lesotho⁸, Malawi, Malaysia⁹, Manitoba, Montserrat, New Brunswick, New Guinea (Trust Territory), New South Wales, New Zealand, Newfoundland, Nigeria, Norfolk Island, Northern Territory of Australia, North-West Territories of Canada, Nova Scotia, Ontario, Papua, Prince Edward Island, Queensland, St Christopher, Nevis and Anguilla, St Helena, St Lucia, St Vincent, Saskatchewan, Seychelles, Sierra Leone, Singapore¹⁰, South Africa¹¹, South Australia, Sri Lanka¹², Swaziland, Tanzania, Tasmania, Tortola¹³, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu¹⁴, Uganda, Vanuatu¹⁵, Victoria, Western Australia, Zambia and Zimbabwe¹⁶.

¹ Ie the Colonial Probates Act Application Order 1965, SI 1965/1530. For an additional order see note 6 *infra*. See also PARA 245 note 6 *ante*.

² Grants made after November 1967 (when Aden ceased to be part of Her Majesty's dominions: see COMMONWEALTH vol 13 (2009) PARA 732) cannot be resealed.

³ Formerly British Honduras: see COMMONWEALTH vol 13 (2009) PARA 741.

⁴ Formerly Bechuanaland Protectorate: see COMMONWEALTH vol 13 (2009) PARA 742.

⁵ Formerly British Guiana: see COMMONWEALTH vol 13 (2009) PARA 754.

⁶ As to the application of the Colonial Probates Act 1892 to the Hong Kong Administrative Region of the People's Republic of China following the reversion of Hong Kong to Chinese rule on 1 July 1997 see PARA 245 note 4 *ante*. The Colonial Probates Act Application Order 1965, SI 1965/1530, in relation to that region, continues in force accordingly: see the Colonial Probates Act 1892 s 1A (added by the Hong Kong (Colonial Probates Act) Order 1997, SI 1997/1572, art 2).

⁷ Formerly the Gilbert Islands: see COMMONWEALTH vol 13 (2009) PARA 758.

⁸ Formerly Basutoland: see COMMONWEALTH vol 13 (2009) PARA 759.

⁹ The Colonial Probates Act 1892 continues, by virtue of the Singapore Act 1966, to apply to Singapore after its secession from the Federation of Malaysia on 9 August 1965: see COMMONWEALTH vol 13 (2009) PARA 778.

¹⁰ See note 9 *supra*.

¹¹ South Africa Act 1962 s 2(1), Sch 2 para 1. As to obtaining a copy of the will in the case of an executor testamentary for the purposes of the Non-Contentious Probate Rules 1987, SI 1987/2024, r 39(5) (see PARA 249 *post*) see Tristram and Coote's Probate Practice (28th Edn) 502. The term 'executor testamentary' to describe the grantee indicates that the deceased died testate.

¹² Formerly Ceylon: see COMMONWEALTH vol 13 (2009) PARA 781.

¹³ Ie the British Virgin Islands: see COMMONWEALTH vol 13 (2009) PARA 866.

¹⁴ Formerly the Ellice Islands: see COMMONWEALTH vol 13 (2009) PARA 786.

¹⁵ Ie by virtue of the Colonial Probates Act (Application to the New Hebrides) Order 1976 SI 1976/579. Vanuatu was formerly known as the New Hebrides: see COMMONWEALTH vol 13 (2009) PARA 788.

¹⁶ Formerly Southern Rhodesia: see COMMONWEALTH vol 13 (2009) PARA 734. See also *Practice Direction* [1980] 2 All ER 324, [1980] 1 WLR 553.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/247. Effect of sealing.

247. Effect of sealing.

A person to whom letters of administration have been granted in a country or territory to which the Colonial Probates Act 1892 applies¹ has, on their being sealed by the High Court², the same duties with respect to the estate of the deceased in England and Wales and the debts which fall to be paid there, as are imposed by statute³ on a person granted administration by the High Court⁴.

¹ See PARA 246 ante.

² I.e. under the Colonial Probates Act 1892 s 2 (as amended) (see PARA 245 ante): see the Administration of Estates Act 1971 s 11(2).

³ I.e. under the Administration of Estates Act 1925 s 25(a), (b) (as substituted) (getting in and administering the estate (see PARA 377 et seq post), exhibiting on oath an inventory of it (see PARA 375 post) and rendering accounts (see PARA 801 post)): see the Administration of Estates Act 1971 s 11(2).

⁴ Ibid s 11(2). As to the general effect of resealing see PARA 243 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/248. Requirements for resealing.

248. Requirements for resealing.

As a condition of sealing letters of administration granted in a country or territory to which the Colonial Probates Act 1892 applies¹, the High Court may, in certain cases² require one or more sureties, in such amount as the court thinks fit, to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased in England and Wales may suffer in consequence of a breach by the administrator of his duties in administering it there³.

A guarantee given in pursuance of any such requirement enures for the benefit of every person interested in the administration of the estate in England and Wales as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly or severally⁴. No claim may be brought on any such guarantee without the leave of the High Court⁵. Stamp duty is not chargeable on any such guarantee⁶.

The above provisions apply to the sealing by the High Court in England and Wales of letters of administration granted by a British court in a foreign country as they apply to the sealing of letters of administration granted in a country or territory to which the Colonial Probates Act 1892 applies⁷.

1 See PARA 246 ante.

2 In cases to which the Supreme Court Act 1981 s 120 (power to require administrators to produce sureties) (see PARA 255 post) applies and subject to the Administration of Estates Act 1971 s 11(4)-(8) (s 11(8) as amended) and subject to and in accordance with probate rules: see s 11(3) (as amended: see note 3 infra). 'Probate rules' means rules of court made under the Supreme Court Act 1981 s 127: Administration of Estates Act 1971 s 11(8) (definition substituted by the Supreme Court Act 1981 s 152(1), Sch 5). As to the probate rules see the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended); and PARA 249 post. Under the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended) there is no provision for the giving of guarantees as a condition of resealing colonial or Commonwealth grants: see PARA 249 post.

3 Administration of Estates Act 1971 s 11(3) (amended by the Supreme Court Act 1981 s 152(1), (4), Schs 5, 7). The provision applies in lieu of the Colonial Probates Act 1892 s 2 (as amended) (see PARA 245 et seq ante): Administration of Estates Act 1971 s 11(1).

4 Administration of Estates Act 1971 s 11(4).

5 Ibid s 11(5).

6 Ibid s 11(6).

7 Ibid s 11(7). See also PARAS 245-246 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act

1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/249. Practice and procedure.

249. Practice and procedure.

A sealed duplicate or certified copy of the Commonwealth or colonial grant may be resealed in England¹. If the deceased died domiciled in the place where the grant was made, and the grant was not such as would be made in England, the grant may nonetheless be resealed here². Where the deceased did not die domiciled in such a place and there is a minority or life interest under English law, the statutory provisions as to the number of personal representatives must be observed³. A limited or temporary Commonwealth or colonial grant may be resealed in England only by leave of a district judge or registrar⁴.

Except by leave of a district judge or registrar, a Commonwealth or colonial grant may not be resealed unless it was made to⁵:

- (1) a person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled⁶;
- (2) where there is no person so entrusted, to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled or, if there is more than one person so entitled, to such of them as the district judge or registrar may direct⁷;
- (3) the executor named in the will (if it is in the English or Welsh language)⁸; or
- (4) if the will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the will, to that person⁹.

The application may be made by the person to whom the grant was made or by any person authorised in writing to apply on his behalf¹⁰. It must be accompanied by: (a) the grant¹¹; (b) a copy of the grant¹²; (c) a copy of any will to which the grant relates¹³; and (d) an Inland Revenue affidavit or account¹⁴. The district judge or registrar must send notice of the resealing to the court which made the grant¹⁵.

The present probate rules¹⁶ do not provide for the giving of guarantees as a condition of resealing colonial or Commonwealth grants¹⁷, so where an application for a grant is made on or after 1 January 1988¹⁸, a guarantee will not be required. The rules do make provision for enforcement of any guarantee, providing that an application for leave¹⁹ to sue a surety on a guarantee, unless the district judge or registrar otherwise directs²⁰, is made by summons to a district judge or registrar and notice of the application is served on the administrator, the surety and any co-surety²¹.

1 See the Colonial Probates Act 1892 s 2(4).

2 *Re McLaughlin* [1922] P 235. See also the Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(1) (as amended), applied by r 39(3) (as amended); and the text to notes 6-7 *infra*. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 *et seq*.

3 See the Supreme Court Act 1981 s 114(2); and PARA 167 *ante*.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 39(4) (amended by SI 1991/1876). For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. See also *Re Smith* [1904] P 114. In *Re Sanders* [1900] P 292 a colonial grant was allowed to be resealed, although the deceased left no assets in England and Wales; however, there was under the will of a third person a legacy due to the deceased's representatives.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 39(3) (amended by SI 1991/1876).

6 Non-Contentious Probate Rules 1987, SI 1987/2024, rr 30(1)(a), 39(3) (as amended: see note 5 supra).

7 Ibid rr 30(1)(b), 39(3) (both amended by SI 1991/1876).

8 Non-Contentious Probate Rules 1987, SI 1987/2024, rr 30(3)(a)(i), 39(3) (as amended: see note 5 supra).

9 Ibid rr 30(3)(a)(ii), 39(3) (as amended: see note 5 supra). As to executorship according to the tenor see PARA 9 ante.

10 Ibid r 39(1). Application may be made by post: *Practice Direction* [1975] 2 All ER 280, [1975] 1 WLR 662.

11 See PARA 245 ante.

12 See the Colonial Probates Act 1892 s 2(1); and PARA 245 ante.

13 Non-Contentious Probate Rules 1987, SI 1987/2024, r 39(5). The grant must include a copy of any such will or be accompanied by a copy of it certified as correct by or under the authority of the court by which the grant was made and, where the copy of the grant to be deposited (see PARA 245 ante) does not include a copy of the will, a copy of it must also be deposited: r 39(5).

14 Ibid r 39(2).

15 Ibid r 39(6) (amended by SI 1991/1876). The fee for resealing the grant is £50: see the Supreme Court (Non-Contentious Probate) Fees Order 1999, SI 1999/688, Sch 1 Fee 1.

16 Ie the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended).

17 Ie under the Administration of Estates Act 1971 s 11(3) (as amended): see PARA 248 ante.

18 Ie the date of the coming into force of the Non-Contentious Probate Rules 1987, SI 1987/2024: see r 1.

19 No action can be brought on a guarantee without the leave of the High Court: see the Administration of Estates Act 1971 s 11(5); and PARA 248 ante.

20 Ie under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 61(1) (as amended), by which a district judge or registrar may require an application to be made by summons to a district judge or registrar in chambers or open court: see PARA 97 ante.

21 Non-Contentious Probate Rules 1987, SI 1987/2024, r 40 (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

249 Practice and procedure

NOTE 15--SI 1999/688 revoked: SI 2004/3123. Fee for resealing the grant is now £40: Non-Contentious Probate Fees Order 2004, SI 2004/3120, Sch 1 Fee 1.

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250. Resealing English grants in the Commonwealth.

The foregoing provisions for resealing grants in England¹ are not applied to any place unless the legislature of that place has made adequate provision for the recognition there of grants made by the courts of the United Kingdom². Where notice is received in the principal registry of the Family Division of the resealing of an English grant, notice of any amendment or revocation of the grant must be sent to the court by which it was resealed³.

1 See PARAS 243-249 ante.

2 Colonial Probates Act 1892 s 1. As to the countries to which those provisions apply see PARA 246 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 39(7).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(7) RECOGNITION AND RESEALING/(ii) Sealing of Commonwealth and Colonial Grants/251. Cancellation of resealing.

251. Cancellation of resealing.

Where it appears to the High Court that a grant resealed under the Colonial Probates Acts 1892 and 1927 ought not to have been resealed, the court may call in the relevant document¹ and, if satisfied that the resealing would be cancelled at the instance of a party interested, may cancel the resealing².

1 'The relevant document' means the original grant or, where some other document was sealed by the court under those Acts, that document: Supreme Court Act 1981 s 121(3). For the meaning of 'grant' see PARA 79 note 2 ante.

2 Ibid s 121(3). A resealing may be cancelled without the relevant document being called in, if it cannot be called in: s 121(4).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(8) FOREIGN DOMICILE GRANTS/252. Right to grant.

(8) FOREIGN DOMICILE GRANTS

252. Right to grant.

Where the deceased dies domiciled outside England and Wales, a grant¹ may be made by order of the district judge or registrar², limited in such way as he may direct to any of the following persons³: (1) to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled⁴; (2) where there is no person so entrusted, to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled or, if there is more than one person so entitled, to such of them as the district judge or registrar may direct⁵; or (3) if in the district judge's or registrar's opinion, the circumstances so require, to such person as he may direct⁶. A grant made under head (1) or head (2) above may be issued jointly with such person as the district judge or registrar may direct if the grant is required to be made to not less than two administrators⁷.

Except in certain cases⁸, the general rules as to priority for a grant⁹ do not apply where the deceased died domiciled outside England and Wales¹⁰.

When it is necessary to decide whether an English grant should be obtained, consideration should be given to the question whether a grant has already been extracted and, if so, to the alternative of obtaining the resealing of that grant¹¹.

1 For the meaning of 'grant' see PARA 27 note 7 ante.

2 For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

3 Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(1) (amended by SI 1991/1876). As to the special provisions as to probate see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(3); and PARA 118 ante. As to the practice regarding grants in cases concerning foreign domiciles see Tristram and Coote's Probate Practice (28th Edn) 418 et seq. As to the rights of a foreign state see PARA 157 ante. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(1)(a).

5 Ibid r 30(1)(b) (amended by SI 1991/1876).

6 Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(1)(c) (amended by SI 1991/1876).

7 Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(2) (amended by SI 1991/1876). A grant may be required to be made to not less than two administrators by virtue of the Supreme Court Act 1981 s 114(2) where a minority or life interest arises: see PARA 167 ante.

8 Ie except in a case to which the Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(3) applies (see PARA 118 ante): see r 28(2).

9 Ie ibid r 20 (as amended) (see PARA 198 ante), r 22 (see PARAS 158-159 ante), r 25 (as amended) (see PARA 168 ante), and r 27 (as amended) (see PARAS 166, 129 ante): see r 28(2).

10 Ibid r 28(2).

11 As to the resealing of grants see PARA 238 et seq ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(8) FOREIGN DOMICILE GRANTS/253. Foreign administrator.

253. Foreign administrator.

Although, in the absence of special circumstances, where the deceased died domiciled abroad an English grant of administration will be made to the person¹ entrusted with the administration by the court of the deceased's domicile², the English courts will not follow the grant of administration made by the courts of the country of the deceased's domicile where to do so would be to act in contradiction of English law³. Accordingly, a grant will not normally be made to a minor domiciled abroad, since his minority would prevent him from exercising in England the authority given him⁴.

1 If a grant should be made to not less than two administrators, according to English law a person may be appointed to act jointly with the foreign administrator: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(2) (as amended); and PARA 252 ante.

2 See *ibid* r 30(1)(a); and PARA 252 ante. See also *Enohin v Wylie* (1862) 10 HL Cas 1; *Re Earl* (1867) LR 1 P & D 450 at 452; *Re Briesemann* [1894] P 260 at 261; *Re Humphries* [1934] P 78; *Procedure Direction* [1951] WN 167; *Re Kaufman* [1952] P 325, [1952] 2 All ER 261. Where the whole or substantially the whole of the estate in England and Wales is immovable property, a grant in respect of the whole estate may be made in accordance with the law applicable if the deceased died domiciled in England and Wales: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 30(3)(b); and PARA 118 ante. Cf *Duncan v Lawson* (1889) 41 ChD 394 at 397 per Kay J, where it was suggested that the administrator should be appointed in relation to leaseholds in England belonging to a domiciled Scotsman according to English law. See also *Pepin v Bruyère* [1902] 1 Ch 24, CA. *Duncan v Lawson* supra was distinguished in *Re Kaufman* [1952] P 325 at 330, [1952] 2 All ER 261 at 263. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

3 *Re Duchess D'Orleans* (1859) 1 Sw & Tr 253.

4 *Re Duchess D'Orleans* (1859) 1 Sw & Tr 253. Cf *Re Meatyard* [1903] P 125. Where a grant is of a very limited nature it will sometimes be made even to a minor domiciled abroad: *Re Countess Da Cunha* (1828) 1 Hag Ecc 237 (grant limited to receipt of dividends to which the minor was entitled).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(8) FOREIGN DOMICILE GRANTS/254. Procedure to obtain grant.

254. Procedure to obtain grant.

Unless otherwise directed by a district judge or registrar, the domicile at the date of death must be sworn to in the oath¹ and is usually recited in the grant². Where evidence as to the law of any country or territory outside England and Wales is required the district judge or registrar may accept an affidavit from any person whom, having regard to the particulars of his knowledge or experience given in the affidavit, the district judge or registrar regards as suitably qualified to give expert evidence of the law in question or a certificate by or an act before a notary practising in the country or territory concerned³. Any affidavit of law should refer to the facts and state the law applicable, but there must be proper supporting evidence of the facts themselves⁴. Affidavits of law made by a person qualified⁵ to give evidence must set out particulars of the knowledge and experience claimed by the deponent to make him competent to give expert evidence of the law of the country in question, but the affidavit of the person claiming or his attorney or the spouse of either, whatever his or her qualifications, must be rejected⁶. An application for a grant to the person entrusted or entitled will not be accepted in the Personal Application Department⁷.

¹ See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 8(2) (as amended); and PARA 128 ante. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. As to resealing grants where the deceased died domiciled outside England and Wales see generally para 238 et seq ante. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

² See *Practice Direction* [1953] 2 All ER 1154 at 1156, [1953] 1 WLR 1237 at 1239. As to Spanish wills see *Practice Direction* [1953] 1 WLR 459 (affidavit of law normally conclusive).

³ See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 19 (as amended); and PARA 102 ante. See also the Civil Evidence Act 1972 s 4(1) (see CIVIL PROCEDURE vol 11 (2009) PARAS 835, 1088); and *Practice Direction* [1972] 3 All ER 912, [1972] 1 WLR 1433.

⁴ See *Practice Direction* [1957] 1 All ER 576, [1957] 1 WLR 462.

⁵ See under the Civil Evidence Act 1972 s 4(1): see CIVIL PROCEDURE vol 11 (2009) PARAS 835, 1088.

⁶ *Practice Direction* [1972] 3 All ER 912, [1972] 1 WLR 1433.

⁷ *Practice Direction* [1953] 2 All ER 1154 at 1157, [1953] 1 WLR 1237 at 1241.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(9) GUARANTEES/255. Guarantees.

(9) GUARANTEES

255. Guarantees.

As a condition of granting administration¹ to any person the High Court may require one or more sureties to guarantee that they will make good, within the limit imposed by the court on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of a breach by the administrator of his duties as such². However, the probate rules³ make no provision for the taking of guarantees on grants of administration, so where an application for a grant is made on or after 1 January 1988⁴, a guarantee will not be required. The probate rules do make provision for enforcement of any guarantee, providing that an application for leave⁵ to sue a surety on a guarantee, unless the district judge or registrar otherwise directs⁶, is made by summons to a district judge or registrar and notice of the application is served on the administrator, the surety and co-surety⁷.

1 For the meaning of 'administration' see PARA 18 note 8 ante.

2 Supreme Court Act 1981 s 120(1), which is expressed to be subject to s 120(2)-(5) and the probate rules. For the meaning of 'probate rules' see PARA 16 note 6 ante. The guarantee enures for the benefit of every person interested in the administration of the estate as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly and severally: s 120(2). For the meaning of 'estate' see PARA 16 note 5 ante. Stamp duty is not chargeable on any such guarantee: s 120(4). Section 120 does not apply where administration is granted to the Treasury Solicitor (see PARA 171 ante), the Official Solicitor (see PARA 213 ante), the Public Trustee (see PARA 176 ante), the Solicitor for the affairs of the Duchy of Lancaster or the Duchy of Cornwall (see PARA 174 ante) or to the consular officer of a foreign state to which the Consular Conventions Act 1949 s 1 (as amended) applies (see PARA 210 ante), or in such other cases as may be prescribed: Supreme Court Act 1981 s 120(5).

3 Ie the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended).

4 Ie the date of the coming into force of the Non-Contentious Probate Rules 1987, SI 1987/2024 (as amended): see r 1.

5 No action may be brought on any guarantee without the leave of the High Court: Supreme Court Act 1981 s 120(3).

6 Ie under the Non-Contentious Probate Rules 1987, SI 1987/2024, r 61 (as amended), by which a district judge or registrar may require an application to be made by summons to a district judge or registrar in chambers or open court: see PARA 97 ante. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante.

7 Ibid r 40 (amended by SI 1991/1876).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/256. Jurisdiction to revoke grants.

(10) REVOCATION OF GRANTS

(i) When and How a Grant may be Revoked

256. Jurisdiction to revoke grants.

Jurisdiction to revoke a grant lies with the Chancery Division of the High Court or the county court if the matter is contentious, and with the Family Division if it is non-contentious¹. The power to revoke² includes power of the court's own motion to call in the grant and revoke or to

revoke if necessary without calling in³. In a contentious matter revocation is ordered by judgment in a probate claim in the Chancery Division or county court⁴. In a non-contentious matter if a district judge or registrar is satisfied that a grant should be amended or revoked he may so order⁵, although, except in special circumstances, no grant may be so amended or revoked except on the application or with the consent of the person to whom it was made⁶. There is no jurisdiction for a district judge or registrar to set aside or vary a previous order to revoke⁷.

1 See PARA 74 ante. As to the distinction between non-contentious and contentious business see PARA 80 ante.

2 See the Supreme Court Act 1981 s 121(1); and PARA 260 post.

3 See *ibid* s 121(2); and PARA 260 post.

4 As to the procedure see *Practice Direction-Contentious Probate Proceedings* (1999) PD 49A; and PARA 297 post. As to the CPR see PARA 37 note 3 ante.

5 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 41(1) (as amended); and PARA 263 post. For the meaning of 'district judge' see PARA 27 note 6 ante; and for the meaning of 'registrar' see PARA 27 note 7 ante. For the meaning of 'grant' see PARA 27 note 7 ante. It is the duty of a personal representative to deliver up to the High Court the grant of probate or administration when required to do so by that court: Administration of Estates Act 1925 s 25(c) (substituted by the Administration of Estates Act 1971 s 9).

6 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 41(2); and PARA 1064 post.

7 *Re Mathew*[1984] 2 All ER 396, [1984] 1 WLR 1011.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

256 Jurisdiction to revoke grants

NOTES--*Practice Direction--Contentious Probate Proceedings* (1999) PD 49A revoked. As to the procedure relating to the revocation of grants see now CPR Pt 57 (added by SI 2001/1388); and *Practice Direction--Probate* (2001) PD 57.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/257. Revocation on ground of false suggestion.

257. Revocation on ground of false suggestion.

A grant may be revoked where it has been obtained upon a false suggestion, whether made fraudulently¹ or in ignorance where the false suggestion obscures a defect in the title to the grant²; it may also be revoked where it subsequently becomes inoperative or useless, or where if allowed to subsist it would prevent the due administration of the estate.

Accordingly, a grant may be revoked if it was obtained on the false suggestion that the person entitled to it is dead³, or while an action is pending in another competent court as to the validity of a will⁴, or by a woman claiming to be the relict of the deceased, but who was not, in fact, legally married to him⁵, or by impostors⁶, or by the elected guardian of a minor where there is a testamentary guardian⁷, or by a minor on the erroneous understanding that he is of age⁸, or by the next of kin where there is a valid residuary bequest⁹. A grant of probate of the will of a living person will be revoked¹⁰.

Revocation will not be granted where the applicant's only complaint is such as to constitute a prima facie case for an order for an inventory and account¹¹.

1 The general rule that a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud does not apply to an action to set aside a judgment granting probate of a will in as much as the will must be either good or bad as against all the world: *Birch v Birch* [1902] P 130, CA. See also PARA 65 ante; and CIVIL PROCEDURE.

2 *Re Cope* [1954] 1 All ER 698, [1954] 1 WLR 608.

3 *Harrison v Weldon* (1731) 2 Stra 911.

4 *Lord Trimlestown v Lady Trimlestown* (1830) 3 Hag Ecc 243.

5 *Re Moore* (1845) 3 Notes of Cases 601; *Re Langley* (1851) 2 Rob Eccl 407.

6 *Re Bergman* (1842) 2 Notes of Cases 22.

7 *Re Morris* (1862) 2 Sw & Tr 360.

8 No minor may act as executor during his minority: *Re Stewart (or Stuart)* (1875) LR 3 P & D 244. Before the Administration of Estates Act 1798 s 6 (repealed, except as to deaths before 1926), a minor could act as executor after the age of 17. The age is now 18: see the Supreme Court Act 1981 s 118; the Family Law Reform Act 1969 s 1; and PARA 16 ante.

9 *Warren v Kelson* (1859) 1 Sw & Tr 290.

10 *Re Napier* (1809) 1 Phillim 83.

11 *Re Cope* [1954] 1 All ER 698, [1954] 1 WLR 608. As to the inventory see further PARA 375 post.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/258. Revocation on discovery of subsequent will.

258. Revocation on discovery of subsequent will.

Where a will has been discovered after a grant of letters of administration or a later will after a grant of probate, or where the grant has been made pending a caveat¹, the original grant may be revoked. A codicil discovered after a grant of probate, if it does not vary the appointment of executors, may be proved alone; if it does vary the appointment, the original grant must be revoked. Where a codicil is discovered after a grant of administration with the will annexed, the original grant must be revoked².

A grant made per incuriam must be revoked, and a grant may be revoked or merely amended if the name of the deceased is wrongly stated³.

1 *Offley v Best* (1666) 1 Lev 186. As to caveats see PARA 86 ante.

2 See *Re Byrne (No 2)* (1910) 44 ILT 192, where a will was found after a limited administrator had acted on his grant, and the court impounded the limited grant and granted probate to the executrix named in the will. As to administration with the will annexed see PARA 196 et seq ante. As to limited grants see PARA 221 et seq ante.

3 Tristram and Coote's Probate Practice (28th Edn) 485.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/259. Revocation for purpose of better administration.

259. Revocation for purpose of better administration.

A grant may be revoked where the executor or administrator becomes incapable of acting by reason of mental disorder or mental or physical ill-health¹, where a creditor administrator has disappeared², or wishes to retire³ after completely settling his own debt, or where the administrator, whether creditor, widow or next of kin, has disappeared⁴, for the real object which the court always keeps in view is the due and proper administration of the estate and the interest of the parties beneficially entitled to it⁵.

A general grant of administration with the will annexed ought not to be revoked on the application of an administrator who has intermeddled with the estate and applies for revocation and a grant to some other next of kin⁶, and only on strong grounds where he has not intermeddled⁷. In the above cases the grant may be revoked at the instance of a creditor⁸.

1 *Re Galbraith* [1951] P 422, [1951] 2 All ER 470n. As to grants in case of mental incapacity see PARA 212 ante.

2 *Re Jenkins* (1819) 3 Phillim 33; *Re Bradshaw* (1887) 13 PD 18.

3 *Re Hoare* (1833) cited in 2 Sw & Tr 361n.

4 *Re Covell* (1889) 15 PD 8; *Re Loveday* [1900] P 154; *Re Colclough* [1902] 2 IR 499; *Re Thomas* [1912] P 177; *Re Boyd* (1912) 46 ILT 294. Cf *Re Dye* (1850) 2 Rob Eccl 342; *Re Ferrier* (1828) 1 Hag Ecc 241; *Re Hoare* (1833) cited in 2 Sw & Tr 361n; *Re Thacker* [1900] P 15.

5 *Re Loveday* [1900] P 154 at 156.

6 *Re Reid* (1886) 11 PD 70, CA. As to intermeddling see PARA 53 et seq ante.

7 *Re Heslop* (1846) 1 Rob Eccl 457. In a special case probate was revoked on the application of the grantee, a married woman, on the ground of difficulties in transferring stock: *Meek and Donald v Curtis* (1827) 1 Hag Ecc 127 at 129.

8 *Re French* [1910] P 169.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/260. Revocation at the instance of the court.

260. Revocation at the instance of the court.

Where it appears to the High Court that a grant of probate or administration ought not to have been granted or that it contains an error, the court may call in the grant and revoke if it is satisfied that the grant would be revoked at the instance of a party interested¹. If the grant cannot be called in the court may nevertheless revoke it².

1 Supreme Court Act 1981 s 121(1). See also *Re Davies, Panton v Jones* (1978) Times, 22 May (where letters of administration were revoked on an irregularity).

2 Supreme Court Act 1981 s 121(2).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/261. Revocation of limited grants.

261. Revocation of limited grants.

A limited grant may be revoked in favour of the assignee of the interest to which the grant was limited¹. A grant limited to carrying on proceedings in Chancery ought not, while still in force, to be revoked in order that a general grant may issue; it should be supplemented by a caeterorum grant².

¹ *Re Ferrier* (1828) 1 Hag Ecc 241. As to limited grants see PARA 221 et seq ante.

² *Re Brown* (1872) LR 2 P & D 455; *Re Byrne (No 2)* (1910) 44 ILT 192. Cf para 258 note 2 ante. As to caeterorum grants see PARA 149 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/262. Executor ought not to apply for revocation.

262. Executor ought not to apply for revocation.

An executor who has obtained probate in common form¹ is not entitled to take steps to have the grant revoked, or to cite the persons interested under the will to propound it in solemn form². He may propound it himself in solemn form, and then give notice to the legatees or devisees that it is to be opposed, and that he does not intend to take steps to support it unless he is guaranteed his costs³. An executor who is also next of kin and has obtained probate, even with full knowledge of the facts, may, however, on a reasonable explanation, take proceedings for revocation⁴.

Probate in common form granted by consent cannot afterwards be revoked on proof that the conditions on which it was granted have not been complied with, unless it was procured by fraud or circumvention⁵.

1 As to probate in common form see PARA 124 et seq ante.

2 As to the object of citations see PARA 91 ante; and as to the former procedure by citation and intervention see *Re Langton* [1964] P 163, [1964] 1 All ER 749, CA. As to probate in solemn form see PARA 269 et seq post.

3 *Re Chamberlain* (1867) LR 1 P & D 316.

4 *Re Williams, Williams v Evans* [1911] P 175 (action by executor next of kin for revocation of probate). See PARA 271 post.

5 *Nicol v Askew* (1837) 2 Moo PCC 88 (Privy Council appeal from Jamaica).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(i) When and How a Grant may be Revoked/263. Procedure for revocation: non-contentious matter.

263. Procedure for revocation: non-contentious matter.

A district judge¹ or registrar² may, in a non-contentious matter, if satisfied that a grant³ should be revoked or amended order accordingly⁴. However, unless there are special circumstances he

may do so only on the application or with the consent of the person to whom the grant was made⁵. Evidence is filed setting out the circumstances, and if the registrar is for any reason not satisfied the matter is referred to a judge⁶.

A revoked grant must be produced and delivered to the district judge or registrar at the time of its revocation, so that it may be cancelled in the registry⁷.

1 For the meaning of 'district judge' see PARA 27 note 6 ante.

2 For the meaning of 'registrar' see PARA 27 note 7 ante.

3 For the meaning of 'grant' see PARA 27 note 7 ante.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 41(1) (amended by SI 1991/1876). Application is made ex parte: see PARA 99 ante. As to the procedure in relation to contentious revocation see PARA 297 post. As to the distinction between non-contentious and contentious business see PARA 80 ante.

5 Non-Contentious Probate Rules 1987, SI 1987/2024, r 41(2).

6 See *Re Bergman* (1842) 2 Notes of Cases 22.

7 As to the calling in of a grant where it is revoked at the instance of the court itself, however, see PARA 260 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(ii) Effect of Revocation/264. Effect of revocation generally.

(ii) Effect of Revocation

264. Effect of revocation generally.

All payments and dispositions¹ made in good faith to a personal representative² under a representation³ which is subsequently revoked are a valid discharge to the person making the same⁴. The personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made⁵. However, he remains liable to account, in the same way as an original administrator is liable to account after a cessate grant to another administrator⁶.

- 1 For the meaning of 'disposition' see PARA 387 note 7 post.
- 2 For the meaning of 'personal representative' see PARA 4 ante.
- 3 For the meaning of 'representation' see PARA 4 note 2 ante.
- 4 Administration of Estates Act 1925 s 27(2).
- 5 Ibid s 27(2).
- 6 See PARA 154 ante.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(ii) Effect of Revocation/265. Payments made in good faith upon grant.

265. Payments made in good faith upon grant.

Persons and corporations making or permitting to be made any payment or disposition¹ in good faith under a representation² are entitled to be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation³.

- 1 For the meaning of 'disposition' see PARA 387 note 7 post.
- 2 For the meaning of 'representation' see PARA 4 note 2 ante.
- 3 Administration of Estates Act 1925 s 27(1). See *Allen v Dundas* (1789) 3 Term Rep 125.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s

59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(ii) Effect of Revocation/266. Effect of revocation upon legal proceedings.

266. Effect of revocation upon legal proceedings.

If, while any legal proceeding is pending in any court¹ by or against an administrator² to whom a temporary administration³ has been granted, that administration is revoked, that court may order that the proceeding be continued by or against the new personal representative⁴ in like manner as if it had been originally commenced by or against him, but subject to such conditions and variations, if any, as that court directs⁵.

1 Including the county court: see the Administration of Estates Act 1925 s 17(2) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt III para 11).

2 For the meaning of 'administrator' see PARA 3 note 1 ante.

3 For the meaning of 'administration' see PARA 3 note 1 ante.

4 For the meaning of 'personal representative' see PARA 4 ante.

5 Administration of Estates Act 1925 s 17(1) (numbered as such by the County Courts Act 1984 Sch 2 Pt III para 11).

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(ii) Effect of Revocation/267. Validity of conveyance not affected by revocation of representation.

267. Validity of conveyance not affected by revocation of representation.

All conveyances¹ of any interest in real² or personal estate made³ to a purchaser⁴ by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation of the probate or administration⁵.

Accordingly, the former distinction between cases where the grant was voidable only⁶ and void ab initio⁷ no longer prevails.

1 'Conveyance' includes a mortgage, charge by way of legal mortgage, lease, assent, vesting, declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest in it by any instrument, except a will, and 'convey' has a corresponding meaning: Administration of Estates Act 1925 s 55(1) (iii). For the meaning of 'will' see PARA 3 note 1 ante.

2 For the meaning of 'real estate' see PARA 3 note 1 ante.

3 If made before 1926 or after 1925: see the Administration of Estates Act 1925 s 37(1).

4 'Purchaser' means a lessee, mortgagee, or other person who in good faith acquires an interest in property for valuable consideration, also an intending purchaser and 'valuable consideration' includes marriage, but does not include a nominal consideration in money: *ibid* s 55(1)(xviii).

5 *Ibid* s 37(1). This provision is without prejudice to any court order made before 1926 and applies whether the testator or intestate died before 1926 or after 1925: s 37(2). Section 37 gives statutory effect to *Hewson v Shelley* [1914] 2 Ch 13, CA (cited in note 7 *infra*) (which overruled *Ellis v Ellis* [1905] 1 Ch 613, and *Abraham v Conyngham* (1676) 2 Lev 182). See also *Re Bridgett and Hayes' Contract* [1928] Ch 163; *Creed v Creed* [1913] 1 IR 48; *Dooley v Dooley* [1927] IR 190, CA; *McParland v Conlon* [1930] NI 138, CA, following *Hewson v Shelley* *supra*.

6 Where a grant of administration was obtained by the suppression of a will not appointing executors, a sale of leaseholds by the administratrix was upheld: *Boxall v Boxall* (1884) 27 ChD 220. See also *Packman's Case* (1596) 6 Co Rep 18b; *Blackborough v Davis* (1701) 1 P Wms 41 at 43; *Woolley v Clark* (1822) 5 B & Ald 744; *Craster v Thomas* [1909] 2 Ch 348, CA (revoked Indian grant).

7 Where a grant of administration was obtained by suppressing a will appointing executors, the grant was held to be void ab initio, and any dealings by the administrator were void (*Graysbrook v Fox* (1564) 1 Plowd 275; *Abraham v Conyngham* (1676) 2 Lev 182; *Ellis v Ellis* [1905] 1 Ch 613), until the principle now made statutory was pronounced in *Hewson v Shelley* [1914] 2 Ch 13, CA, where the deceased's widow was granted letters of administration as if on intestacy and conveyed to a purchaser part of the real estate; a will appointing executors was afterwards found, and the executors, after obtaining probate, sued the widow for recovery of the sold realty. The Court of Appeal held that the purchaser retained a good title.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

267 Validity of conveyance not affected by revocation of representation

NOTE 4--In definition of 'valuable consideration' in Administration of Estates Act 1925 s 55(1)(xviii) after 'includes marriage,' add 'and formation of a civil partnership': Civil Partnership Act 2004 Sch 4 para 12.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/2. THE GRANT OF PROBATE OR ADMINISTRATION/(10) REVOCATION OF GRANTS/(ii) Effect of Revocation/268. Stay after revocation.

268. Stay after revocation.

Where an administration judgment or order has been made in a claim brought by a person whose grant is subsequently revoked, an order may be obtained to stay all further proceedings in the action¹, or on appeal the claim may be dismissed or the order or judgment may be reversed².

1 *Houseman v Houseman* (1876) 1 ChD 535, CA.

2 *Re Dean, Dean v Wright* (1882) 21 ChD 581, CA.

UPDATE

72-268 The Grant of Probate or Administration

It is an offence to make a false or misleading statement in an application for a grant of probate or letters of administration: see Courts and Legal Services Act 1990 s 54; and PARA 124A.

As from 1 October 2009 (see SI 2009/1604) the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see Constitutional Reform Act 2005 s 59. Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment substitute 'Senior Courts Act 1981': see 2005 Act Sch 11 para 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(1) WHEN PROBATE IN SOLEMN FORM IS NECESSARY/269. Proof in solemn form.

3.

(1) WHEN PROBATE IN SOLEMN FORM IS NECESSARY

269. Proof in solemn form.

If there is any doubt as to the validity of a will or any apprehension that there may be opposition to it, or proof of it in common form has been prevented by a caveat and the entry of an appearance to the warning of that caveat¹, it is open to the executor or any person with a beneficial interest under the will to prove it in solemn form. To obtain such proof he must begin a probate claim, making the persons interested in opposing the will, whether under another will or on intestacy, defendants². In cases where several legatees are interested for relatively small amounts the claimant may use the procedure for obtaining a representation order without making them defendants³, or use the procedure for court-directed notification of the claim

whereby the persons are bound by the judgment on the claim if they do not decide to become defendants⁴, or simply retain proof that he has notified them of the proceedings⁵.

Anyone intending to make a probate claim should, before commencing proceedings, observe any relevant pre-action protocol⁶.

1 See PARAS 86-90 ante.

2 The procedure is governed by the CPR subject to *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A: see CPR 49(1), (2)(g). See also CIVIL PROCEDURE. Where a legatee will take the same amount whatever the outcome under another will or on intestacy, he is not a person interested and need not be joined. As to the CPR see PARA 37 note 3 ante.

3 See CPR Sch 1 RSC Ord 15 r 13. As to the application of that rule to probate claims see PARA 294 post.

4 See CPR Sch 1 RSC Ord 15 r 13A; and PARAS 287 note 6, 809 post.

5 Every person who may be affected by a probate claim, either as a beneficiary under a will in issue or on an intestacy, and who is not joined as a party to the probate claim must be given notice of the proceedings: see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.5; and PARA 287 post. As to the effect of notification see PARAS 287, 296 post. An order obtained by consent or default does not normally found res judicata: see *Pople v Evans*[1969] 2 Ch 255, [1968] 2 All ER 743; *Re Barraclough*[1967] P 1, [1965] 2 All ER 311. As to the court's power to approve a compromise and bind absent persons see PARA 294 post. The court may, under CPR 39.3(2), (3), set aside an order in a probate claim in appropriate circumstances, eg if a defendant is by unavoidable accident prevented from appearing at the trial: see *Re Barraclough* at 11 and 316 per Payne J. See also CPR 39.3(5) which provides that the application to set aside may only be granted if the applicant acted promptly when he found out about the court's order, had a good reason for not attending the trial, and has a reasonable prospect of success.

6 The purpose of pre-action protocols is to encourage exchange of information between the prospective parties to litigation at an early stage, to promote early settlement and enable the parties to comply readily with the court timetable after the proceedings are commenced, and costs penalties may be incurred in the proceedings if the relevant protocol is not observed: see *Practice Direction--Protocols* (1999) Protocol PD paras 1.3, 1.4, 2.3. So long as there is no protocol specific to contentious probate, the court will expect the parties to potential probate proceedings, in accordance with the overriding objective as set out in CPR Pt 1 (see PARA 37 note 3 ante), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings: *Practice Direction--Protocols* (1999) Protocol PD para 4. Apart from the protocols, in will disputes every effort should be made by executors to avoid costly litigation and full information should be given to those attacking the will as to how the will was made, including in appropriate cases the circumstances in which the instructions for it were given and all the surrounding circumstances leading up to the preparation and making of the will: *Larke v Nugus* (1979) 123 Sol Jo 337. Also, the conduct of the parties, before as well as during the proceedings, and the efforts made, if any, before and during the proceedings in order to try to resolve the dispute, are to be taken into account by the court in assessing the amount of costs to be recoverable by one party from another: see CPR 44.5(3)(a); and PARA 327 post. As to the court's power to obtain evidence about testamentary documents before proceedings are commenced see the Supreme Court Act 1981 ss 122, 123; and PARA 76 ante. As to the court's power to order disclosure of documents before proceedings are started see PARA 289 post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

269 Proof in solemn form

NOTE 2--CPR 49(2)(g) revoked: SI 2001/1388.

TEXT AND NOTE 3--CPR Sch 1 RSC Ord 15 r 13 revoked: SI 2000/221.

TEXT AND NOTE 4--CPR Sch 1 RSC Ord 15 r 13A revoked: SI 2001/256. See now CPR 19.8A (added by SI 2001/256).

NOTE 6--*Practice Direction--Protocols* Protocol PD para 4 renumbered as para 4.1, and PARAS 4.2-4.10, 4A added.

Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(1) WHEN PROBATE IN SOLEMN FORM IS NECESSARY/270. When an executor need not prove.

270. When an executor need not prove.

An executor is not obliged to propound a will, and may be condemned in costs if he sets up a document unjustifiably¹. If he has not intermeddled with the estate he may renounce probate², or he may fail to appear to a citation to propound the will, and if it is pronounced for in solemn form may still accept probate³.

1 See *Re Speke, Speke v Deakin* (1913) 109 LT 719; and PARA 329 post.

2 See PARA 26 ante.

3 *Bewsher v Williams and Ball* (1861) 3 Sw & Tr 62. If, however, he failed to appear to a citation to take out probate his rights in respect of the executorship would wholly cease: see PARA 85 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(1) WHEN PROBATE IN SOLEMN FORM IS NECESSARY/271. Validity of codicil in doubt.

271. Validity of codicil in doubt.

An executor who doubts the validity of a codicil should not cite the persons interested under it to propound it, but should proceed to prove the will in solemn form¹. A bare executor who has proved a will in common form cannot, as executor, take proceedings to call in question the validity of that will², but if the executor has a personal interest in the estate and has taken out probate in common form he may be entitled to revocation of probate if he offers an adequate explanation³.

1 *Re Benbow* (1862) 2 Sw & Tr 488; *Re Muirhead* [1971] P 263, [1971] 1 All ER 609.

2 *Re Chamberlain* (1867) LR 1 P & D 316.

3 *Re Williams, Williams v Evans* [1911] P 175 (executor next of kin); cf *Dooley v Dooley* [1927] IR 190, CA. See also PARA 262 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(1) WHEN PROBATE IN SOLEMN FORM IS NECESSARY/272. Persons entitled to call for proof in solemn form.

272. Persons entitled to call for proof in solemn form.

The persons entitled on intestacy are entitled to call for proof in solemn form, whether or not probate has been granted in common form; and so may a legatee or devisee whose legacy or devise has been omitted from the probate, and an executor, legatee, or devisee named in any other testamentary instrument of the deceased whose interest is adversely affected by the will in question¹. Where, however, probate has been granted in common form, the person concerned to compel proof in solemn form must proceed for revocation of the grant unless the executors themselves decide to propound the will in solemn form².

The mere acquiescence of one of the persons entitled on intestacy in probate being granted in common form is no bar to the exercise of this right by him, even though he has received a legacy under the will³, but he must bring into court the amount of his legacy⁴ unless he is a minor⁵. Long acquiescence may prove a bar unless the party can account satisfactorily for the delay⁶.

The following may also claim proof of a will in solemn form: (1) the Treasury Solicitor where on intestacy the estate would pass to the Crown as bona vacantia because there is no known person capable of taking an absolute interest in his estate under the statutory provisions relating to distribution on intestacy⁷; (2) the solicitors for the duchies of Cornwall or Lancaster where the estate would on intestacy pass as bona vacantia⁸ and the deceased died domiciled in, or, if he died abroad, possessed property in, either of the duchies⁹; and (3) a creditor or other appointee to whom administration has actually been granted if a will is said to have been found and proceedings are taken to revoke the grant¹⁰.

1 See Tristram and Coote's Probate Practice (28th Edn) 27.

2 *Re Jolley, Jolley v Jarvis* [1964] P 262 at 271, [1964] 1 All ER 596 at 599, CA, per Wilmer LJ, and at 275 and 602 per Danckwerts LJ. As to probate in common form see PARA 124 et seq ante.

3 *Bell v Armstrong* (1822) 1 Add 365; *Core v Spencer* (1796) cited in 1 Add 374; *Merryweather v Turner* (1844) 3 Curt 802.

4 *Bell v Armstrong* (1822) 1 Add 365 at 374; *Braham v Burchell* (1826) 3 Add 243 at 256.

5 *Goddard v Norton* (1846) 5 Notes of Cases 76.

6 *Newell v Weeks* (1814) 2 Phillim 224 at 232.

7 See PARAS 170-171 ante. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

8 As to the circumstances in which the estate of a deceased person passes as bona vacantia see PARAS 613-614 post. As to distribution on intestacy see generally para 583 et seq post.

9 As to the rights of the Duchy of Lancaster and the Duke of Cornwall to bona vacantia see PARA 613 post. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

10 *Menzies v Pulbrook and Ker* (1841) 2 Curt 845; *Dabbs v Chisman*, *Jennens v Lord Beauchamp* (1810) 1 Phillim 155.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(1) WHEN PROBATE IN SOLEMN FORM IS NECESSARY/273. Legal aid.

273. Legal aid.

Legal aid¹ is available to the parties to contentious probate proceedings who fulfil the necessary conditions, whether the matter is tried in the High Court or the county court. Where an application for legal aid is made by a person who is concerned in proceedings only in a representative, fiduciary or official capacity (such as an executor, administrator or trustee), there is taken into account the value of any property or estate or fund out of which the applicant is entitled to be indemnified and the financial resources of any persons (including the applicant if appropriate) who might benefit from the proceedings². The application may either be approved subject to the payment from the property estate or fund, or from the resources of the persons who might benefit, of any sums, or may be refused if such refusal will not cause hardship³. In relation to applications by beneficiaries, it should be noted that when determining an application for legal aid, it must be considered whether it is reasonable and proper for persons concerned jointly with or having the same interest as the applicant to defray so much of the costs as would be payable from the legal aid fund in respect of the proceedings if a legal aid certificate were issued⁴.

Legal aid may be granted in respect of non-contentious probate matters in certain circumstances⁵.

Legal advice and assistance⁶ may be available on the application of English law to particular circumstances and as to any steps which may appropriately be taken, including advice on making a personal grant for probate or letters of administration⁷.

1 Ie under the Legal Aid Act 1988 Pt IV (ss 14-18) (as amended).

2 See the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 33(a). This provision negatives, in relation to personal representatives and trustees of wills, the decision in *R v Legal Aid Committee No 9 (North-Eastern) Legal Aid Area, ex p Foxhill Flats (Leeds) Ltd* [1970] 2 QB 152, [1970] 1 All ER 1176, DC.

3 See the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 33(b).

4 See *ibid* reg 32(1). As to contribution to the costs by other persons interested see reg 32(3), (4).

5 The Legal Aid Board's *Notes for Guidance* para 4-04 states that legal aid is not available for a grant of representation unless it is necessary to enable a legally aided action to be brought (for legal aid in the latter circumstances see the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 46(3)(d), but there is no specific exclusion of such an application and the basis for this assertion is presumably that a non-contentious application does not constitute 'proceedings' within the Legal Aid Act 1988 s 14 (as amended).

6 Ie under *ibid* Pt III (ss 8-13) (as amended).

7 See the Legal Aid Board's *Notes for Guidance* para 2-32.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

273 Legal aid

The legal aid system under the Legal Aid Act 1988, which is largely repealed, is replaced by the Access to Justice Act 1999 Pt I (ss 1-26): see further LEGAL AID vol 65 (2008) PARA 2.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(2) JURISDICTION/274. The High Court.

(2) JURISDICTION

274. The High Court.

The High Court has unlimited jurisdiction over contentious probate business¹, and the Chancery Division is the division of the High Court to which such business is assigned². As a result of the transfer of the jurisdiction in contentious probate to the Chancery Division³, construction of wills and administration of estates is merged in one division reducing some of the problems of jurisdiction which have arisen in the past⁴. The Chancery Division is also concerned, as before, with the supervision of the administration and distribution of the estate⁵, the interpretation of the will⁶ and the guidance of the personal representatives⁷.

1 See the Supreme Court Act 1981 s 25; and PARA 73 ante. As to the meaning of contentious probate business see PARA 80 ante; and as to the functions of the probate court see PARA 75 ante.

2 See *ibid* s 61(1), Sch 1 para 1(h). As to the history of the probate jurisdiction, which was originally that of the ecclesiastical courts, see PARAS 72-74 ante. Probate proceedings may only be carried on at the Royal Courts of Justice or in a Chancery District Registry: see PARA 277 post.

3 *Ie* from the then Probate, Divorce and Admiralty Division (now the Family Division), with effect from 1 October 1971: see PARA 74 ante.

4 See PARA 75 ante. Where a question of validity of a will is purely one of the construction of testamentary documents, it is now possible to have it resolved in proceedings for a declaration instead of propounding the will in solemn form: see eg *Re Finne more*[1992] 1 All ER 800, [1991] 1 WLR 793.

5 The court must see that the personal representatives carry the will into effect so far as they are able to do so (*Re Manifold, Slater v Chryssaffinis*[1962] Ch 1 at 18, [1961] 1 All ER 710 at 719), and will if necessary retain the administration under its control (*Re Lorillard, Griffiths v Catforth*[1922] 2 Ch 638, CA).

6 See PARA 75 ante. See also WILLS vol 50 (2005 Reissue) PARA 476 et seq.

7 See PARA 713 post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

274 The High Court

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(2) JURISDICTION/275. County courts.

275. County courts.

Where an application for the grant or revocation of probate or administration has been made through the principal registry of the Family Division or a district probate registry¹, and it is shown to the satisfaction of a county court that the value at the date of the death of the deceased of his net estate² does not exceed the county court limit³, the county court has the jurisdiction of the High Court in respect of any contentious matter arising in connection with the grant or revocation⁴. If these preconditions are not fulfilled, jurisdiction cannot be conferred on the county court by the consent of the parties⁵.

1 *Ie* under the Supreme Court Act 1981 s 105: see PARA 124 ante.

2 The 'net estate' for this purpose in relation to a deceased person means the estate of that person exclusive of any property he was possessed of or entitled to as a trustee and not beneficially, and after making allowances for funeral expenses and for debts and liabilities: County Courts Act 1984 s 32(2) (s 32 substituted by the Administration of Justice Act 1985 s 51(1)).

3 At the date at which this volume states the law the county court limit is £30,000: see the County Courts Jurisdiction Order 1981, SI 1981/1123 (as amended); and COURTS.

4 County Courts Act 1984 s 32(1) (as substituted: see note 2 supra).

5 Ibid ss 18, 24 (both as amended) (see COURTS), which enable jurisdiction in many types of case to be conferred by consent, do not apply to probate proceedings. As to the power of the High Court to transfer proceedings to the county court see PARA 276 post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

275 County courts

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(2) JURISDICTION/276. Transfer of proceedings.

276. Transfer of proceedings.

The High Court may order the transfer of any proceedings before it to a county court, either on its own motion or on the application of any party¹. Proceedings so transferred are transferred to such county court as the High Court considers appropriate, having taken into account the convenience of the parties and that of any other persons likely to be affected and the state of business in the courts concerned². The High Court has no power to grant a new trial or to make any order or give directions as to the mode of trial in the county court³ or to make any order as to costs⁴. After transfer, any application as to the mode of trial must be made to the county court⁵.

If probate proceedings which are before the county court are outside the county court jurisdiction the county court must either transfer them to the High Court or strike them out⁶. In addition, a county court or the High Court may order transfer to the High Court of probate proceedings which are in the county court⁷. A county court may transfer proceedings before it, or any part of those proceedings, to another county court⁸, and the High Court may transfer proceedings, or any part of them, which are before the High Court, from the Royal Courts of Justice to a district registry, or from a district registry to the Royal Courts of Justice or another district registry⁹.

In considering whether to exercise any of its discretionary powers of transfer¹⁰ the court is to have regard to: (1) the financial value of the claim, and the amount in dispute (if different)¹¹; (2) whether it would be more convenient or fair for hearings to be held in some other court¹²; (3)

the availability of a judge specialising in the type of claim in question¹³; (4) whether the facts, legal issues, remedies or procedures involved are simple or complex¹⁴; (5) the importance of the outcome of the claim to the public in general¹⁵; and (6) the facilities available at the court where the claim is being dealt with and whether they may be inadequate because of any disabilities of a party or potential witness¹⁶.

1 See the County Courts Act 1984 s 40(2), (3) (as substituted); and COURTS. The transfer of proceedings under s 40 (as substituted) does not affect any right of appeal from the order directing the transfer: see s 40(5) (as substituted); and COURTS. As to the criteria to which the court is to have regard in considering whether to exercise any of its discretionary powers of transfer see the text and note 11 infra.

2 See *ibid* s 40(4) (as substituted); and COURTS.

3 *Zealley v Veryard* (1866) LR 1 P & D 195.

4 *Macleur v Macleur* (1868) LR 1 P & D 604.

5 See *Norris v Allen* (1862) 32 LJPM & A 3.

6 See the County Courts Act 1984 s 42(1), (7) (as substituted); and COURTS. Striking out is to occur if the claimant knew or ought to have known that the proceedings were outside the county court jurisdiction: see s 42(1)(b) (as substituted); and COURTS.

7 See *ibid* ss 41 (as amended), 42(2) (as substituted); and COURTS. The transfer of proceedings under s 42 (as substituted) does not affect any right of appeal from the order directing the transfer: see s 42(4) (as substituted); and COURTS. For the criteria to which the court is to have regard see the text and note 11 infra.

8 See CPR 30.2(1). For the criteria to which the court is to have regard see the text and note 11 infra. As to the CPR see PARA 37 note 3 ante.

9 See CPR 30.2(4), (8). For the criteria to which the court is to have regard see the text and note 11 infra. As to the Chancery district registries see PARA 277 note 4 post.

10 See the County Courts Act 1984 ss 40(2) (as substituted), 41(1) or 42(2) (as substituted) and CPR 30.2(1), (4) (see the text to notes 1, 2, 7-9 supra): see CPR 30.3(1).

11 CPR 30.3(2)(a).

12 CPR 30.3(2)(b).

13 CPR 30.3(2)(c).

14 CPR 30.3(2)(d).

15 CPR 30.3(2)(e).

16 CPR 30.3(2)(f). Contentious probate proceedings are among the exceptions to the general rule that claims in the High Court in London with an estimated value of less than £50,000 should be transferred to the county court, and are expressed to be suitable for trial in the High Court in London: *Practice Direction--the Multi-Track* (1999) PD 29 paras 2.2, 2.6.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

276 Transfer of proceedings

TEXT AND NOTES 10-16--In addition, head (7) whether the making of a declaration of incompatibility under the Human Rights Act 1998 s 4 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 104A.2) has arisen or may arise: CPR 30.3(2)(g) (added by SI 2000/2092). Head (8) in the case of civil proceedings by or against the Crown, as defined in CPR 66.1(2), the location of the relevant government department or officers of the Crown and, where appropriate, any relevant public interest that the matter should be tried in London: CPR 30.3(2)(h) (added by SI 2005/2292).

NOTE 16--*Practice Direction--the Multi-Track* PD 29 para 2.2 amended.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/277. Claim form.

(3) PROCEDURE

277. Claim form.

A probate claim¹ in solemn form must be begun by the issue of a claim form² containing a statement of the nature of the interest of the claimant and of the defendant in the estate of the deceased to which the claim relates³. If the claim is to be commenced in the High Court, the claim form must be issued out of Chancery Chambers or one of the Chancery district registries⁴. If a probate claim is commenced in the county court, the claimant's solicitor should inform the Principal Registry of the Family Division⁵. A claim form may with the permission of the court be served out of the jurisdiction⁶. A claim form must either contain or have served with it particulars of claim, or else contain a statement that particulars of claim are to follow⁷.

The service of the claim form and acknowledgment of service are governed by the general Civil Procedure Rules⁸.

1 For the meaning of 'probate claim' see PARA 76 note 2 ante.

2 For the general rules concerning claim forms see CPR Pt 7; *Practice Direction--How to Start Proceedings: the Claim Form* (2000) PD 7A. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

3 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.4. For the steps to be taken before commencing proceedings see PARA 269 ante. As to notification of persons who may be affected by the claim but are not joined as parties see PARA 287 post. As to the practice in claims for revocation of a grant see PARA 297 post.

4 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.1. The Chancery district registries are at Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, Newcastle upon Tyne, and Preston: PD49A para 2.1. If a claim form is wrongly issued out of a district registry other than a Chancery district registry, an application should be made forthwith for the transfer of the claim to the Royal Courts of Justice or a Chancery district registry, and the court may order such a transfer on its own initiative: PD49A para 2.2. The county court has a contentious probate distribution where the value of the estate is below the county court limit: see PARA 275 ante.

5 Registrar's Circular 8 May 1969. This may be unnecessary now that *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.3 provides that the court issuing the claim form is to request all relevant documents from the Family Division: see PARA 78 ante.

6 CPR Sch 1 RSC Ord 11 r 1(1)(l). CPR Sch 1 RSC Ord 11 applies to county court as well as High Court proceedings: CPR Sch 1 RSC Ord 11 r 10. Proceedings concerning wills and succession are excluded from the scope of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (as amended) (Brussels, 27 September 1968, OJ C027, 26.1.98, p 1) and the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September 1988, OJ L319, 25.11.88, p 9) by art 1 of the Brussels Convention (see the Civil Jurisdiction and Judgments Act 1982 ss 2(2), 3A(2), Sch 1

(as substituted), Sch 3C (as added); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 74), and so probate proceedings may not be served in EC or EFTA countries without the permission of the court under CPR Sch 1 RSC Ord 11 r 1(2): see CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 71, 119.

7 See CPR 16.2(2).

8 For the rules governing service and acknowledgment of service see CPR Pts 6, 10. As to the requirement of and time limit for acknowledgment of service and as to failure to acknowledge service see PARA 278 post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

277 Claim form

TEXT AND NOTES--Probate claims in the High Court are assigned to the Chancery Division: CPR 57.2(2) (Pt 57 added by SI 2001/1388). Probate claims in the county court must only be brought in a county court where there is also a Chancery district registry, or the Central London County Court: CPR 57.2(3) (substituted by SI 2003/2113). All probate claims are allocated to the multi-track: CPR 57.2(4)). A probate claim must be commenced (1) in the relevant office; and (2) using the procedure in CPR Pt 7: CPR 57.3. 'Probate claim' means a claim for (a) the grant of probate of the will or letters of administration of the estate, of a deceased person; (b) the revocation of such a grant; or (c) a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious (or common form) probate business: CPR 57.1(2)(a). 'Relevant office' means (i) in the case of High Court proceedings in a Chancery district registry, that registry; (ii) in the case of any other High Court proceedings, Chancery Chambers at the Royal Courts of Justice, Strand, London, WC2A 2LL; and (iii) in the case of county court proceedings, the office of the county court in question: CPR 57.1(2)(b). 'Will' includes a codicil: CPR 57.1(2)(d). For further provision relating to the starting of a probate claim see *Practice Direction--Probate* PD 57 paras 2.1-2.4.

TEXT AND NOTE 6--CPR Sch 1 RSC Ord 11 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/278. Failure to acknowledge service.

278. Failure to acknowledge service.

A defendant on whom a probate claim form¹ is served must, subject to the longer periods allowed where it is served out of the jurisdiction², file an acknowledgement of service within 14 days after service of the claim form on him³. The rules which ordinarily apply in case of failure

to acknowledge service of the claim form⁴ do not apply to probate claims⁵. Where any of several defendants to a probate claim fails to acknowledge service of the claim form, the claimant may, after the time for acknowledging service has expired and upon filing an affidavit or witness statement proving due service of the claim form on that defendant proceed with the probate claim as if that defendant had acknowledged service⁶. Where the defendant, or all the defendants, fail to acknowledge service of the claim form then, unless on the claimant's application the court orders the claim to be discontinued, the claimant may, after the time for acknowledging service has expired⁷, apply to the court for an order for trial of the claim⁸. Before applying for such an order the claimant must file an affidavit or witness statement proving due service of the claim form on the defendant or defendants and, if no particulars of claim were contained in or served with the claim form, he must file particulars of claim in the relevant office⁹. Where the court grants an order for trial, it may direct the claim to be tried on written evidence¹⁰, and the hearing may lead to an order pronouncing for the will in solemn form¹¹.

1 For the meaning of 'probate claim' see PARA 76 note 2 ante; and for the meaning of 'claim form' see PARA 78 note 1 ante.

2 For the time limits for acknowledging service where service is out of the jurisdiction see CPR Sch 1 RSC Ord 11 r 1A. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

3 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 4, which is expressed to be subject to CPR 10.3(2). This differs from the general provisions of the CPR in two ways: (1) acknowledgment of service is required even where the defendant files a defence within 14 days of service on him of the particulars of claim (cf CPR 10.1, 12.3, 15.4); and (2) the 14 days for acknowledging service are calculated from the service of the claim form even if the claim form states that particulars of claim are to follow (cf CPR 10.3).

4 Ie CPR 10.2, Pt 12: see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 6.1.

5 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 6.1.

6 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 6.2.

7 See the text to note 2 supra.

8 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 6.3. As to discontinuance see PARA 292 post.

9 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 6.4.

10 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 6.5. As to trial on written evidence cf para 285 post. For the rules as to written evidence see CPR Pt 32; *Practice Direction--Written Evidence* (1999) PD 32; and CIVIL PROCEDURE.

11 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 10.3.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

278 Failure to acknowledge service [or file a defence]

TEXT AND NOTES--Replaced. A defendant who is served with a claim form must file an acknowledgment of service: CPR 57.4(1) (Pt 57 added by SI 2001/1388). Subject to CPR 57.4(3), the period for filing an acknowledgment of service is (1) if the defendant is served with a claim form which states that particulars of claim are to follow, 28 days after service of the particulars of claim; and (2) in any other case, 28 days after service of the claim form: CPR 57.4(2). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service is 14 days longer than the relevant period specified in CPR 6.35 or *Practice Direction--Service out of the Jurisdiction* PD 6B: CPR 57.4(3) (amended by SI 2008/2178). CPR 15(4) (which provides the period for filing a defence) applies as if the words 'under Part 10' were omitted from CPR 15.4(1)(b): CPR 57.4(4).

A default judgment cannot be obtained in a probate claim and CPR 10.2 and Pt 12 do not apply: CPR 57.10(1). If any of several defendants fails to acknowledge service the claimant may (a) after the time for acknowledging service has expired; and (b) upon filing written evidence of service of the claim form and (if no particulars of claim were contained in or served with the claim form) the particulars of claim on that defendant, proceed with the probate claim as if that defendant had acknowledged service: CPR 57.10(2). If no defendant acknowledges service or files a defence then, unless on the application of the claimant the court orders the claim to be discontinued, the claimant may, after the time for acknowledging service or for filing a defence (as the case may be) has expired, apply to the court for an order that the claim is to proceed to trial: CPR 57.10(3). When making an application under CPR 57.10(3), the claimant must file written evidence of service of the claim form and (if no particulars of claim were contained in or served with the claim form) the particulars of claim on each of the defendants: CPR 57.10(4). Where the court makes an order under CPR 57.10(3), it may direct that the claim be tried on written evidence: CPR 57.10(5). For the meaning of probate claim see PARA 277.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/279. Testamentary scripts.

279. Testamentary scripts.

A testamentary script is a will or draft will, written instructions for a will made by or at the request or under the instructions of the testator and any document purporting to be evidence of the contents or to be a copy of a will which is alleged to have been lost or destroyed¹. The originals of all such scripts must be lodged in the relevant office² of the court under the procedure indicated below³. Where the script or any part of it is written in pencil, then, unless the court otherwise directs, a facsimile copy of it, or of the page or pages containing the part written in pencil, must also be lodged with the words which appear in pencil in the original underlined in red ink on the copy⁴.

Unless the court otherwise directs, the claimant and every defendant who has acknowledged service of the claim form⁵ must by affidavit or witness statement⁶: (1) describe any testamentary script of the deceased person, whose estate is the subject of the claim, of which he has any knowledge or, if such is the case, state that he knows of no such script⁷; and (2) if any such script of which he has knowledge is not in his possession or under his control, give the

name and address of the person in whose possession or under whose control it is or, if such is the case, state that he does not know the name and address of that person⁸.

Any such affidavit or witness statement must be filed, and any testamentary script referred to in it which is in the possession or under the control of the deponent must be lodged in the relevant office within the prescribed time⁹. Except with the permission of the court, a party to a probate claim is not allowed to inspect an affidavit or witness statement filed, or any testamentary script lodged unless and until an affidavit or witness statement sworn or made by him containing the required information¹⁰ has been filed¹¹. A supplemental affidavit or witness statement of scripts may be ordered¹², or may be voluntarily filed.

A party desiring that a testamentary script be examined by an expert should apply to the court¹³. The application notice or the written evidence in support¹⁴ should explain the nature and purpose of the examination and the points to which the examination should be directed¹⁵. The court may order such an examination on its own initiative¹⁶.

1 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 1.2(iii). As to the CPR see PARA 37 note 3 ante.

2 For the meaning of 'relevant office' see PARA 76 note 2 ante.

3 See *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.2. It is important that testamentary scripts should not be marked, stapled or folded (para 5.6). Accordingly a script should be described in, but not made an exhibit to, the witness statement or affidavit.

4 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.3.

5 For the meaning of 'claim form' see PARA 78 note 1 ante.

6 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.1. For the requirements as to the form and content of witness statements and affidavits see CPR Pt 32; *Practice Direction--Written Evidence* (1999) PD 32. See also CIVIL PROCEDURE. See also PARA 291 note 2 post.

7 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.1(a). The scripts should be described but not exhibited: see note 3 supra.

8 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.1(b).

9 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.2. The prescribed time is 14 days after the acknowledgment of service by a defendant to the claim or, if no defendant acknowledges service and the court does not otherwise direct, before an order is made for the trial of the claim: para 5.2. A copy of the script must also be lodged: see PARA 280 post.

10 The information required by *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.1 (see the text to notes 6-8 supra): see PARA 5.4.

11 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.4.

12 See *Peacock v Lowe* (1867) LR 1 P & D 311; subsequent proceedings at 478n.

13 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.7(i). Application should be made in accordance with CPR Pt 23: see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.7(i).

14 This may be in a witness statement, an affidavit, or be set out in the application notice itself, provided, in the latter case, that if it contains evidence it is verified by a statement of truth: see CPR 22.1(3); *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.7(ii).

15 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.7(ii).

16 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.7(iii).

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

279 Testamentary [documents]

TEXT AND NOTES--Replaced. Any testamentary document of the deceased person in the possession or control of any party must be lodged with the court: CPR 57.5(1) (Pt 57 added by SI 2001/1388). Unless the court directs otherwise, the testamentary documents must be lodged in the relevant office (1) by the claimant when the claim form is issued; and (2) by a defendant when he acknowledges service: CPR 57.5(2). The claimant and every defendant who acknowledges service of the claim form must in written evidence (a) describe any testamentary document of the deceased of which he has any knowledge or, if he does not know of any such testamentary document, state that fact; and (b) if any testamentary document of which he has knowledge is not in his possession or under his control, give the name and address of the person in whose possession or under whose control it is or, if he does not know the name or address of that person, state that fact: CPR 57.5(3). Unless the court directs otherwise, the written evidence required by CPR 57.5(3) must be filed in the relevant office (i) by the claimant, when the claim form is issued; and (ii) by a defendant when he acknowledges service: CPR 57.5(4). Except with the permission of the court, a party will not be allowed to inspect the testamentary documents or written evidence lodged or filed by any other party until he himself has lodged his testamentary documents and filed his evidence: CPR 57.5(5). The provisions of CPR 57.5(2), (4) may be modified by a practice direction under Pt 57: CPR 57.5(6). As to testamentary documents and evidence about the same see now *Practice Direction--Probate* PD 57 para 3.1-3.3. 'Testamentary document' means a will, a draft of a will, written instructions for a will made by or at the request of, or under the instructions of, the testator, and any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed: CPR 57.1(2)(c). For the meaning of 'relevant office' see PARA 277.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/280. Copies of scripts and transmission.

280. Copies of scripts and transmission.

When a party lodges an original testamentary script¹ in court he must also file a copy². When a script is not lodged by a party (for example when it is forwarded by the Family Division³) the party relying on it must lodge a copy before the first hearing at which the script has to be considered⁴.

When a probate claim in the High Court in London is listed for trial outside London the solicitor for the party responsible for preparing the court bundle must write to the Chancery Registry to request that the testamentary scripts be forwarded to the appropriate district registry⁵.

1 For the meaning of 'testamentary script' see PARA 279 ante.

2 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.5; *Chancery Division Practice Direction--Probate* CDPD 9 para C. This is to avoid undue handling of original scripts, which will remain in the relevant office of the court until the claim has been disposed of: see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.5. Photographic copies are preferred but typed copies are acceptable: *Chancery Division Practice Direction--Probate* CDPD 9 para C. As to the procedure for obtaining examination of the original by an expert see PARA 279 ante. See also CIVIL PROCEDURE.

3 See *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.3; and PARA 78 ante.

4 *Chancery Division Practice Direction--Probate* CDPD 9 para C. This in terms only applies to the High Court but would be good practice in the county court.

5 *Chancery Division Practice Direction--Probate* CDPD 9 para B. The address of the Chancery Registry is Room TM7.09, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: *Chancery Division Practice Direction--Probate* CDPD 9 para B.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/281. Particulars of claim.

281. Particulars of claim.

Unless the court gives permission to the contrary or unless particulars of claim were contained in or served with the claim form¹, the claimant in a probate claim² must serve particulars of claim on every defendant who acknowledges service of the claim form and must do so before the expiration of 28 days after acknowledgment of service by that defendant or of eight days after the filing by that defendant of an affidavit or witness statement of testamentary scripts³, whichever is the later⁴, unless the latest time for serving the claim form⁵ is an earlier time, in which case the particulars of claim must be served by then⁶.

Where the claimant disputes the interest of a defendant, he must state in his particulars of claim that he denies the interest of that defendant⁷.

- 1 For the meaning of 'claim form' see PARA 78 note 1 ante.
- 2 For the meaning of 'probate claim' see PARA 76 note 2 ante.
- 3 le under *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.1 (see PARA 279 ante); see PARA 7.1. For the meaning of 'testamentary script' see PARA 279 ante. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.
- 4 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 7.1. As to the procedure if the claimant fails to serve his particulars of claim see PARA 285 post.
- 5 le four months after issue of the claim form, unless it is to be served out of the jurisdiction, in which case it is six months after issue: see CPR 7.5.
- 6 See CPR 7.4(2).
- 7 See *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.1; and PARA 169 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

281 Particulars of claim

NOTE 5--CPR 7.5 substituted: SI 2008/2178.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/282. Defence, counterclaim and reply.

282. Defence, counterclaim and reply.

A defence must, subject to certain exceptions¹, be filed within 28 days after service of the particulars of claim or, if the claimant files his affidavit or witness statement of testamentary scripts² after service of the particulars of claim, within 28 days after the affidavit or witness statement of testamentary scripts has been filed and the testamentary scripts have been lodged³. A defendant to a probate claim⁴ who alleges he has any claim or is entitled to any remedy relating to the grant of probate of the will, or letters of administration of the estate, of the deceased person must add to his defence a counterclaim in respect of that matter⁵. If the claimant fails to serve particulars of claim any such defendant may, with the permission of the court, serve a counterclaim and the probate proceedings⁶ then continue as if the counterclaim were the particulars of claim and the counterclaiming defendant were the claimant⁷.

Any reply must be served and filed at the time when the claimant files his allocation questionnaire⁸. Any defence to counterclaim should be included in the same document as the reply and should follow on from it⁹.

A probate counterclaim¹⁰ must contain a statement of the nature of the interest of the defendant and of the claimant in the estate of the deceased to which the counterclaim relates¹¹. Unless within seven days after the service of a probate counterclaim in High Court proceedings an application is made for an order¹² for the probate counterclaim to be struck out or dealt with in separate proceedings and the application is granted, the court must, if necessary on its own initiative, order the transfer of the proceedings to the Chancery Division (if it is not already assigned to that Division) and to either the Royal Courts of Justice or a Chancery district registry (if it is not already proceeding in one of those places)¹³.

1 The exceptions are where different limits apply under the provisions referred to in CPR 15.4(2): see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 7.2. These include: (1) CPR Sch 1 RSC Ord 11 r 1B (which specifies how the period for filing a defence is calculated where the claim form is served out of the jurisdiction); and (2) CPR Pt 11 (which provides that, where the defendant makes an application disputing the court's jurisdiction, he need not file a defence before the hearing): see CPR 15.4(2). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 Ie under *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 5.1, 5.2 (see PARA 279 ante): see PARA 7.2. For the meaning of 'testamentary script' see PARA 279 ante.

3 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 7.2. As to affidavits or witness statements of testamentary scripts see PARA 279 ante. A defence may be confined to requiring the claimant to prove the will in solemn form, and this provides certain advantages in terms of costs if it fails: see PARA 283 post.

4 For the meaning of 'probate claim' see PARA 76 note 2 ante.

5 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 8.1. In general, where a defendant to a claim serves a counterclaim under CPR Pt 20, the defence and counterclaim should normally form one document with the counterclaim following on from the defence: see *Practice Direction--Defence and Reply* (1999) PD 15 para 3.1; and CIVIL PROCEDURE.

6 For the meaning of 'probate proceedings' see PARA 76 note 2 ante.

7 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 8.2. As to the defences available see PARA 300 et seq post.

8 See CPR 15.8. As to the allocation questionnaire see CPR 26.3. The time for filing the allocation questionnaire is set by the court but is at least 14 days after deemed service of it (see CPR 26.3(6)), and it is not served until at least one defendant has served a defence (see CPR 26.3(1), (2)).

9 See *Practice Direction--Defence and Reply* (1999) PD 15 para 3.2.

10 'Probate counterclaim' means a counterclaim by which the defendant makes a probate claim in any proceedings other than probate proceedings: *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 16.1. For the meanings of 'probate claim' and 'probate proceedings' see PARA 76 note 2 ante. *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A applies with the necessary modifications to a probate counterclaim as it applies to a probate claim begun by a probate claim form: para 16.2, which is expressed to be subject to paras 16.3-16.5.

11 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 16.3.

12 Ie under CPR 3.2(e) (which it is submitted should read CPR 3.1(2)(e)) or 3.4 (see CIVIL PROCEDURE): see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 16.4.

13 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 16.4. If an order is made for a probate counterclaim to be dealt with in separate proceedings, the order must, if the proceedings are in the High Court, order transfer of the probate counterclaim as required under para 15.4 (which it is submitted should read para 16.4): para 16.5. As to the Chancery district registries see PARA 277 note 4 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

282 Defence, counterclaim and reply

TEXT AND NOTES--Replaced. A defendant who contends that he has any claim or is entitled to any remedy relating to the grant of probate of the will, or letters of administration of the estate, of the deceased person must serve a counterclaim making that contention: CPR 57.8(1) (Pt 57 added by SI 2001/1388). If the claimant fails to serve particulars of claim within the time allowed, the defendant may, with the permission of the court, serve a counterclaim and the probate claim will then proceed as if the counterclaim were the particulars of claim: CPR 57.8(2). For the meanings of 'probate claim' and 'will' see PARA 277.

In the following provision, 'probate counterclaim' means a counterclaim in any claim other than a probate claim by which the defendant claims any such remedy as is mentioned in CPR 57.1(2)(a): CPR 57.9(1). Subject to CPR 57.9(3)-(5), CPR Pt 57 applies with the necessary modifications to a probate counterclaim as it applies to a probate claim: CPR 57.9(2). A probate counterclaim must contain a statement of the nature of the interest of each of the parties in the estate of the deceased to which the probate counterclaim relates: CPR 57.9(3). Unless an application notice is issued within seven days after the service of a probate counterclaim for an order under CPR 3.1(2)(e) or CPR 3.4 for the probate counterclaim to be dealt with in separate proceedings or to be struck out, and the application is granted, the court must order the transfer of the proceedings to either (1) the Chancery Division (if it is not already assigned to that Division) and to either the Royal Courts of Justice or a Chancery district registry (if it is not already proceeding in one of those places); or (2) if the county court has jurisdiction, to a county court where there is also a Chancery district registry or the Central London County Court: CPR 57.9(4) (amended by SI 2003/3361). If an order is made that a probate counterclaim be dealt with in separate proceedings, the order must order the transfer of the probate counterclaim as required under CPR 57.9(4): CPR 57.9(5).

As to the filing of a defence see PARA 278.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/283. Limitation of costs on notice of intention to cross-examine only.

283. Limitation of costs on notice of intention to cross-examine only.

A party opposing a will may give notice in his defence that he will raise no positive case but will insist on the will being proved in solemn form of law, and, for that purpose, will cross-examine the witnesses who attested the will¹. In such a case no order for costs is to be made against the defendant unless it appears that there was no reasonable ground for opposing the will². It does not follow because a defendant fails that there was no reasonable ground³. A person seeking to call in and obtain revocation of a probate⁴, or a party alleging in his statement of case undue influence or fraud, has no right to give such a notice⁵.

1 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 8.3. This provision repeats the former RSC Ord 62 r 4(3) with some differences, in particular under the Practice Direction the intention must be to cross-examine the attesting witnesses only, while a notice under RSC Ord 62 r 4(3) could have been given with a view to cross-examination of other witnesses produced in support of the will. Under the previous rules conditional notice could be given, as, for instance, that, if both the attesting witnesses are produced, it is only intended to cross-examine the witnesses: *Leeman v George* (1868) LR 1 P & D 542. See also *Re Sanders, Riches and Woodey v Sanders* (1961) 105 Sol Jo 324. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 *Practice Direction about Costs--Directions Relating to CPR Pt 44* (2000) PD 44 para 2.2. Where a party unsuccessfully opposes a will, it is possible that he may not be ordered to pay the successful party's costs even though he did not give such a notice in his defence: see PARA 330 post. As to costs generally see PARA 327 et seq post.

3 *Davies v Jones* [1899] P 161. In *Re Spicer, Spicer v Spicer* [1899] P 38, and *Perry v Dixon* (1899) 80 LT 297, the defendants were ordered to pay the costs.

4 *Tomalin v Smart* [1904] P 141. See also *Patrick v Hevercroft* (1920) 123 LT 201. As to revocation see PARA 256 et seq ante.

5 *Ireland v Rendall* (1866) LR 1 P & D 194; *Cleare v Cleare* (1869) LR 1 P & D 655; *Harrington v Bowyer* (1871) LR 2 P & D 264.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

283 Limitation of costs on notice of intention to cross-examine only

NOTE 1--In a probate claim where a defendant has in his defence given notice that he requires the will to be proved in solemn form, the court will not make an order for costs against the defendant unless it appears that there was no reasonable ground for opposing the will: *Practice Direction About Costs (supplementing CPR Pts 43-48)* (1999) PD 43 para 8.2; *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 8.3 (as amended). For the meaning of 'probate claim' see PARA 76.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/284. Contents of statements of case.

284. Contents of statements of case.

In a probate claim¹ in which the interest by virtue of which a party claims to be entitled to a grant of letters of administration is disputed, the party disputing that interest must show in his statement of case that if the allegations made in it are proved he would be entitled to an interest in the estate². Any party who wants to contend that at the time when a will, the subject of the probate claim, was alleged to have been executed the testator did not know and approve of its contents must specify in his statement of case the nature of the case on which he intends to rely³. That party is precluded from making in support of that contention any allegation which would be relevant in support of a contention that: (1) the will was not duly executed⁴; (2) at the time of the execution of the will the testator was not of sound mind, memory and understanding⁵; or (3) the execution of the will was obtained by undue influence or fraud⁶, unless that other contention is also made in his statement of case⁷. For this purpose an allegation is only relevant to such other contention if it would, if established either alone or in conjunction with other facts also alleged in the statement of case, affirmatively prove the relevant alternative contention⁸. Although undue influence or fraud has not been alleged in a statement of case, those who challenge a will for want of knowledge and approval may cross-examine so as to suggest the inference that the reason the testator did not know and approve the contents of the will was that the witness was fraudulent⁹.

A statement of case should make clear the general nature of the case of the party whose statement it is, and should be a concise statement of the facts on which he relies¹⁰. It must be verified by a statement of truth¹¹, and may refer to points of law, give the names of witnesses, and have attached to it or served with it copies of documents¹². A claimant or counterclaiming defendant must specifically set out in his particulars of claim, among other things, any allegation of fraud, and any details of unsoundness of mind or undue influence where he wishes to rely on them in support of his claim¹³.

1 For the meaning of 'probate claim' see PARA 76 note 2 ante.

2 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.2. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

3 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3. As to the allegation of want of knowledge and approval see PARA 316 et seq post.

4 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3(a). As to want of due execution see PARA 303 et seq post.

5 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3(b). As to want of sound disposing mind see PARA 306 et seq post.

6 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3(c). As to undue influence and fraud see PARA 323 et seq post.

7 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3.

8 *Re Stott, Klouda v Lloyds Bank Ltd* [1980] 1 All ER 259, [1980] 1 WLR 246 (a decision on the former RSC Ord 76 r 9(3) which was in substance the same as *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3). The mere fact that an allegation, if proved, might constitute evidence that could incidentally assist the proof of the relevant alternative contention, if raised, does not cause it to be 'relevant' for this purpose: *Re Stott, Klouda v Lloyds Bank Ltd* supra at 265 and 253 per Slade J. See also *Re Reynolds, Pearkes v Reynolds* [1955] 1 All ER 18, [1955] 1 WLR 12, CA. See further the text and note 10 infra.

9 *Wintle v Nye* [1959] 1 All ER 552 at 560, [1959] 1 WLR 284 at 294, HL, per Viscount Simonds. It has been said that it would be preferable that allegations of fraud and undue influence should feature less in probate

statements of case since the decision in *Wintle v Nye* supra: see *Re Fuld (No 3)*, *Hartley v Fuld* as reported in [1968] P 675 at 722 per Scarman J.

10 See CPR 16.2(1)(a); and *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793, CA, per Lord Woolf MR. The need for extensive statements of case including particulars is reduced by the requirement that witness statements are now exchanged (see PARA 291 post), and the purpose of statements of case is to identify the issues and the extent of the dispute between the parties: *McPhilemy v Times Newspapers Ltd* supra at 792-793 per Lord Woolf MR. For the detailed rules concerning statements of case see CPR Pt 16 and *Practice Direction--Statements of Case* (2000) PD 16; and for amendments to them see CPR Pt 17 and *Practice Direction--Amendments to Statements of Case* (1999) PD 17. See also CIVIL PROCEDURE.

11 See CPR 22.1(1). In a statement of case a statement of truth is a statement that the party whose case it is (or that party's litigation friend) believes the facts stated to be true, and it may be signed either by the party whose case it is (or that party's litigation friend), or by the party's legal representative on behalf of that party (or litigation friend): see CPR 22.1(4)-(6).

12 See *Practice Direction--Statements of Case* (2000) PD 16 para 16.3. Documents relied on should now be referred to in the Statement of Case and copies supplied, rather than set out extensively in the Statement of Case, and if an extract from a document has to be included it should be placed in a schedule: *Chancery Guide* (1999) App 1 para 14.

13 See *Practice Direction--Statements of Case* (2000) PD 16 para 10.2(1), (6).

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

284 Contents of statements of case

TEXT AND NOTES 1-7--Replaced. The claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate: CPR 57.7(1) (Pt 57 added by SI 2001/1388). If a party disputes another party's interest in the estate he must state this in his statement of case and set out his reasons: CPR 57.7(2). Any party who contends that at the time when a will was executed the testator did not know of and approve its contents must give particulars of the facts and matters relied on: CPR 57.7(3). Any party who wishes to contend that (1) a will was not duly executed; (2) at the time of the execution of a will the testator was not of sound mind, memory and understanding; or (3) the execution of a will was obtained by undue influence or fraud, must set out the contention specifically and give particulars of the facts and matters relied on: CPR 57.7(4). A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will: CPR 57.7(5)(a). If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will: CPR 57.7(5)(b). For the meaning of 'will' see PARA 277. See also *O'Brien v Seagrave* [2007] EWHC 788 (Ch), [2007] 3 All ER 633.

NOTE 10--*Practice Direction--Statements of Case* (2000) PD 16 amended.

NOTE 11--Reference to CPR 22.1(1) should be to CPR 22.1(1)(a) (substituted by SI 2001/1769). CPR 22.1(4) amended: SI 2004/3419.

TEXT AND NOTE 12--*Practice Direction--Statements of Case* (2000) PD 16 para 16.3 revoked.

NOTE 13--*Practice Direction--Statements of Case* (2000) PD 16 para 10.2(1), (6) now para 8.2(1), (6).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/285. Default of statement of case.

285. Default of statement of case.

The rules which ordinarily apply in the case of default of a statement of case¹ do not apply to a probate claim². Where any party to a probate claim fails to serve on any other party a pleading which he is required to serve³, then, unless the court orders the claim to be discontinued or dismissed, that other party may, after the period for service⁴ has expired, apply to the court for an order for trial of the probate claim⁵. If an order is made the court may direct the probate claim to be tried on written evidence⁶, and the hearing may lead to an order pronouncing for the will in solemn form⁷. If the court orders trial on written evidence in such a case or in a case where an claim is compromised⁸, or there is an application for summary judgment for an order pronouncing for a will in solemn form⁹, an attesting witness has to make a witness statement or swear an affidavit of due execution of any will or codicil sought to be admitted to probate¹⁰. The will or codicil is, however, in the court's possession and cannot be handed out of court for use as an exhibit to the witness statement or affidavit¹¹. Where the witness is unable to visit the Royal Courts of Justice to sign his witness statement or swear his affidavit in the presence of an officer of the court, he may exhibit to his witness statement or affidavit a photographic copy¹² certified as authentic by the court; in such a case the witness statement or affidavit must state that the exhibit is an authenticated copy signed in the witness's presence¹³.

1 See CPR Pt 12. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 10.1. For the meaning of 'probate claim' see PARA 76 note 2 ante.

3 He required by the CPR or by *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A: see PARA 10.2.

4 He the period fixed by the CPR or by *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A for service of the pleading in question: see PARA 10.2.

5 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 10.2.

6 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 10.2.

7 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 10.3.

8 He under *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 13: see PARA 294 post.

9 He under *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 11: see PARA 293 post. Applications for summary judgment are governed by CPR Pt 24: see CIVIL PROCEDURE. As to summary judgment in probate claims see PARA 293 post.

10 *Chancery Division Practice Direction--Probate* CDPD 9 para A(i).

11 *Chancery Division Practice Direction--Probate* CDPD 9 para A(i).

12 The copy may be requested by the solicitor concerned from the Chancery Registry, Room TM7.09, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: *Chancery Division Practice Direction--Probate* CDPD 9 para A(ii).

13 *Chancery Division Practice Direction--Probate* CDPD 9 para A(ii).

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/286. Case management.

286. Case management.

After the service of the defence¹, the court will serve an allocation questionnaire on each party². When the completed questionnaires have been filed by the parties³, or the period for doing so has expired, whichever is the sooner, the court will allocate the claim to a track⁴. If the allocation is to the multi-track, the court will then either issue directions and a timetable for the steps to be taken before the trial, or fix a case management conference or a pre-trial review, or both, and give such other directions as it sees fit⁵. The court will fix a date or period for the trial to take place as soon as practicable⁶, and will, after the time fixed by the timetable or directions for the parties to return the listing questionnaire⁷, set a timetable for the trial⁸.

Apart from the special power to order the production of testamentary papers⁹, and the requirement that the parties sign witness statements or swear affidavits of testamentary scripts¹⁰, the steps to be taken before trial in a probate claim on the multi-track are much the same as in other proceedings¹¹.

1 Where there are two or more defendants and at least one of them serves a defence, the allocation questionnaire is served when they have all served a defence or the period for the filing of the last defence has expired: see CPR 26.3(2). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 26.3. The court can dispense with the need for a questionnaire: see CPR 26.3(1)(b).

3 On filing the completed questionnaire a party may make a written request for a stay of proceedings while the parties try to settle the case by alternative dispute resolution or other means, and if all parties request such a stay or the court considers it appropriate, a stay of one month (with the possibility of subsequent extensions) will be directed: see CPR 26.4.

4 See CPR 26.5. Specialist proceedings within CPR Pt 49, which include contentious probate proceedings, are directed to be allocated to the multi-track irrespective of the value of the claim: see *Practice Direction--Case*

Management--Preliminary Stage: Allocation and Re-Allocation (2000) PD 26 para 10.2(2). As to the factors relevant to transfer from High Court to county court see PARA 276 ante.

5 See CPR 29.2(1). At this stage the court's first concern is to ensure that the issues between the parties are identified and that the necessary evidence is prepared and disclosed: see *Practice Direction--the Multi-track* (1999) PD 29 para 4.3. The parties are encouraged to agree directions where possible (see PARA 4.6), but these must be approved by the court and satisfy the requirements of paras 4.7, 4.8 which include agreeing a date or period for the trial. See also CPR 29.4. As to directions concerning further information see PARA 288 post; as to disclosure of documents see PARA 289 post; and as to evidence see PARA 291 post.

6 See CPR 29.2(2).

7 le under CPR 29.6.

8 See CPR 29.8. For further details of case management on the multi-track see CPR Pt 29; *Practice Direction--the Multi-track* (1999) PD 29. As to directions concerning evidence see PARAS 291, 295 post.

9 See PARA 76 ante.

10 See PARA 279 ante.

11 See CPR Pts 29-35.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

286 Case management

TEXT AND NOTES--In giving case management directions in a probate claim the court will give consideration to the questions (1) whether any person who may be affected by the claim and who is not joined as a party should be joined as a party or given notice of the claim, whether under CPR 19.8A or otherwise; and (2) whether to make a representation order under CPR 19.6 or CPR 19.7: *Practice Direction--Probate* PD 57 para 4. For the meaning of 'probate claim' see PARA 277.

NOTE 2--CPR 26.3 amended: SI 2001/4015.

NOTE 4--Reference to CPR Pt 49 now to CPR Pts 49, 58-62: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-Allocation* PD 26 para 10.2(2) (as amended).

TEXT AND NOTES 7, 8--For 'listing questionnaire' read 'pre-trial check list': CPR 29.8 (amended by SI 2002/2058).

NOTE 8--*Practice Direction--the Multi-track* PD 29 amended.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/287. Parties and notice to non-parties.

287. Parties and notice to non-parties.

Every person who may be affected by a probate claim¹, either as a beneficiary under a will in issue or on an intestacy, and who is not joined as a party to the probate claim, should be given notice of the proceedings². Where it is necessary for the court to bind any class of persons, for example pecuniary legatees, the persons in that class should be made defendants³, or a representation order should be obtained⁴, or a direction should be given by the court that those who are not parties be notified of the proceedings⁵ in such a way that each has an opportunity to become a party, and, if he does not, will be bound by any judgment given in the claim as if he was a party⁶. If the person successfully propounding the will gives notice of the proceedings to interested parties, without obtaining such an order of the court, they should still be bound by an order pronouncing for or against the will in solemn form unless new facts come to light⁷.

1 For the meaning of 'probate claim' see PARA 76 note 2 ante.

2 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.5. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

3 If under CPR 19.1, 19.3. CPR 19.2(1), which requires all persons jointly entitled to a remedy to be parties unless the court orders otherwise, does not apply to probate proceedings: see CPR 19.2(3).

4 If under CPR Sch 1 RSC Ord 15 r 13 or CPR Sch 2 CCR Ord 5 r 6: see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.5. These are powers conferred, in relation to (among other proceedings) proceedings concerning the estate of a deceased person, to appoint one or more persons to represent any person (including an unborn person) or class who is or may be interested in or affected by the proceedings, if it is expedient to do so and the person, class or member of the class cannot be readily ascertained, cannot be found, or it is expedient for the purposes of saving expense: see CPR Sch 1 RSC Ord 15 r 13(1), (2); CPR Sch 2 CCR Ord 5 r 6(1). An order of the court made when the person or persons so appointed are before the court is binding on the person or class represented: see CPR Sch 1 RSC Ord 15 r 13(3); CPR Sch 2 CCR Ord 5 r 6(2). As to citations in non-contentious matters see PARA 91 et seq ante. As to approval of compromises after a representation order has been made see PARA 294 post.

5 If under CPR Sch 1 RSC Ord 15 r 13A: see PARA 809 post. This rule applies to county court probate claims as well as High Court ones: *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.6. A direction for notice to a non-party can be given at any stage, and on the application of a party or by the court of its own motion: see CPR Sch 1 RSC Ord 15 r 13A(1); and PARA 809 post. An application for an order can be made without notice to the other parties and but must be supported by written evidence giving the grounds of the application: see Ord 15 r 13A(2); and PARA 809 post.

6 CPR Sch 1 RSC Ord 15 r 13A(3). He becomes a party by acknowledging service of the claim form within 14 days of service of the notice on him: see Ord 15 r 13A(4). If he does not become a party, and after service of the notice the claim form is amended so as substantially to alter the relief claimed, the court may direct that the judgment is not to bind him unless a further notice together with a copy of the amended claim form is issued and served on him: Ord 15 r 13A(5).

7 See PARAS 269 ante, 296 post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

287 Parties and notice to non-parties

NOTE 3--CPR 19.1-19.3 now CPR 19.2-19.4: SI 2000/221. See also *Practice Direction--Group Litigation* (2000) PD 19B (as amended).

NOTE 4--CPR Sch 1 RSC Ord 15 r 13, Sch 2 CCR Ord 5 revoked: SI 2000/221, SI 2006/1689.

TEXT AND NOTES 5, 6--CPR Sch 1 RSC Ord 15 r 13A revoked: SI 2001/256. See now CPR 19.8A (added by SI 2001/256).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/288. Further information.

288. Further information.

In a claim concerning the validity of a will it may be appropriate for the court to order a party to give additional information about the execution of the will and the surrounding circumstances¹. Otherwise the practice as to ordering a party to clarify any matter which is in dispute in the proceedings or to give additional information in relation to such a matter is no different in probate matters from the practice in other forms of litigation².

¹ See *Re Holloway, Young v Holloway* (1887) 12 PD 167, CA (allegation of exercise of undue influence by executors and universal legatee; interrogatories allowed as to benefits received by them from deceased in his lifetime, as to the agreement between them in his lifetime, as to the division of his property, and as to the making over of property by the legatee to the executor). The current procedure for exchange of witness statements (see PARA 291 post) will reduce, but not in all cases eliminate completely, the need for requests for further information.

² See CPR Pt 18. Orders for clarification and additional information under CPR Pt 18 replace the former interrogatories and requests for further and better particulars. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/289. Disclosure of documents.

289. Disclosure of documents.

The court has power to order standard disclosure¹ and specific disclosure² of documents, and will consider whether to order, and normally will order, standard disclosure as part of giving directions after allocation of a case to the multi-track³. The court also has power to order disclosure before proceedings start⁴ and power to order disclosure against a person who is not a party to the claim⁵.

In probate claims disclosure may be ordered more widely than in other claims. Where testamentary capacity is in issue, inquiry may extend to the whole life of the testator and to anything in his handwriting⁶. The same may apply, though to a lesser extent, where the issue raised is the exercise of undue influence or of fraud⁷, or where the allegation is that the deceased did not know or approve of the contents of the will in question.

1 An order to give disclosure is an order to give standard disclosure unless the court otherwise directs, but the court or the parties by written agreement may dispense with or limit standard disclosure: see CPR 31.5. A party to a claim discloses a document by stating that the document exists or has existed: CPR 31.2. 'Document' means anything in which information of any description is recorded: CPR 31.4. Standard disclosure is disclosure by a party of the documents which are or have been in his control on which he relies, or which adversely affect his own case, adversely affect another party's case, or support another party's case: see CPR 31.6, 31.8. The disclosing party must make a reasonable search for documents (see CPR 31.7), and disclosure is effected by providing a list and a disclosure statement (see CPR 31.10). As to the right to inspect and claims to withhold from inspection see PARA 290 post. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 31.12. See also note 1 supra.

3 See CPR 29.2; and *Practice Direction--Disclosure and Inspection* (1999) PD 31 para 1.1. For the rules as to disclosure see CPR Pt 31; *Practice Direction--Disclosure and Inspection* (1999) PD 31. As to the right of any person who may have a claim arising out of a deceased person's death to access to that person's health records see the Access to Health Records Act 1990 s 3 (as amended); and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 216. As to case management on the multi-track see PARA 286 ante. As to the requirement that all parties give written evidence of testamentary scripts see PARA 279 ante.

4 Ie under the Supreme Court Act 1981 s 33(2) (as amended); and the County Courts Act 1984 s 52(2) (as amended). For the procedure see CPR 31.16.

5 Ie under the Supreme Court Act 1981 s 34(2) (as amended); and the County Courts Act 1984 s 53 (as amended). For the procedure see CPR 31.17.

6 *Austin v Collett* (1907) Times, 7 December per Bagnall J. A countervailing factor is the overriding objective and in particular the principle of proportionality: see CPR Pt 1; and PARA 37 note 3 ante.

7 As to the defences of undue influence or fraud see PARA 323 et seq post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57

added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

289 Disclosure of documents

NOTE 3--*Practice Direction--Disclosure and Inspection* (1999) PD 31 amended.

NOTES 4, 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/290. Inspection.

290. Inspection.

A party to whom a document has been disclosed has a right to inspect the document, except where the party disclosing it no longer controls it, has a right or duty to withhold it, or considers that inspection would be disproportionate to the issues in the case¹. A party may also inspect a document mentioned in a statement of case, a witness statement, a witness summary, an affidavit, or an expert's report². Under the special power of the court to order the production of an instrument purporting to be testamentary the court may, whether or not any legal proceedings are pending, order any person in whose possession or control the instrument is to bring it into court in such manner as the court may direct³.

In one case inspection of a coffin buried in consecrated ground has been obtained⁴.

1 See CPR 31.3. The disclosure list must list the documents withheld, and give the reasons for claiming to withhold them (see CPR 31.3(2), 31.10(4), 31.19(3), (4)), and the claim can be challenged under CPR 31.12 or 31.19(5). As to the grounds upon which production must be resisted see PARA 291 post. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 31.14.

3 See under the Supreme Court Act 1981 s 123: see PARA 76 ante. See also *Re Shepherd* [1891] P 323, where the executor and solicitor of a deceased testatrix were ordered to deposit in the registry all wills and testamentary papers of hers which were in their possession, and the applicant was given liberty to take copies. As to the court's general power to order disclosure of documents before proceedings have started see PARA 289 ante.

4 See *Druce v Young* [1899] P 84; *R v Tristram* [1898] 2 QB 371, DC (both cases are episodes in the same litigation, where revocation of a grant of probate was claimed on the grounds that the deceased was still living for some time after his officially-recorded death).

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

290 Inspection

TEXT AND NOTE 2--CPR 31.14 (as originally enacted) renumbered CPR 31.14(1); SI 2001/4015. Words 'or an experts report' omitted: CPR 31.14(1) (amended by SI 2001/4015). Subject to CPR 35.10(4) (see civil procedure), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings: CPR 31.14(2) (added by SI 2001/4015).

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/291. Evidence and privilege.

291. Evidence and privilege.

The court may control the evidence by giving directions as to the issues on which evidence is required, the nature of the evidence required to decide those issues, and the way in which it is to be placed before the court¹. The court will order a party to serve on the other parties any witness statement² of the oral evidence which the party serving the statement intends to rely on at the trial³. Hearsay evidence is admissible subject to procedural rules for giving advance notice of reliance on it, and to the court's power to control the evidence⁴.

Difficulties can arise in a probate claim as to the evidence of a testator's advisers, especially solicitors with whom there was a privileged relationship during his lifetime⁵. The death of a client does not end the privilege, which can be claimed by successors in title⁶. As between such successors in title, however, the privilege cannot be claimed, for the privilege belongs equally to all who derive title under the testator, whether personal representatives, beneficiaries or, presumably, creditors⁷. If the privilege was shared with some other person or persons during the testator's lifetime, it seems that the solicitor is bound not to make any disclosure even to the testator's successors in title unless he has the consent of the other person or persons entitled to the privilege⁸.

A solicitor who is not a party to probate proceedings cannot be required to answer requests for information, but he can be ordered by the court to disclose documents⁹, and he can be summoned to give evidence or produce documents¹⁰. If there is any claim to privilege for his potential evidence he should refuse disclosure to anyone until compelled upon by witness summons to answer questions after argument on the claim to privilege. Subject to this qualification a solicitor should, if there is a genuine dispute, make available a statement of his evidence about the execution of the will and the circumstances surrounding it to any person

who asks him for such a statement, whether or not the solicitor is acting for persons propounding any will of the testator¹¹.

1 See CPR 32.1(1). See also CIVIL PROCEDURE vol 11 (2009) PARA 749 et seq; CIVIL PROCEDURE. The court may use this power to exclude evidence that would otherwise be admissible and to limit cross-examination: see CPR 32.1(2), (3). There are no express limitations on the exercise of this power, although it must be exercised in support of dealing justly with the case: *Grobelaar v Sun Newspapers* (1999) Times, 12 August, CA. As to the overriding objective when exercising such powers see CPR Pt 1; and PARA 37 note 3 ante.

2 A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally: CPR 32.4(1). It must be verified by a statement of truth (see CPR 22.1(1)), and contempt of court proceedings may be brought in respect of dishonest false statements in a witness statement (see CPR 32.14). For the formal requirements see *Practice Direction--Written Evidence* (1999) PD 32; and CIVIL PROCEDURE vol 11 (2009) PARA 979 et seq. The witness must still be called to give oral evidence at the trial: see CPR 32.5(1). For the other rules concerning witness statements see CPR Pt 32; and CIVIL PROCEDURE.

3 See CPR 32.4(2). The order will normally be made on allocation of the claim to the multi-track (see PARA 286 ante) and will normally be for simultaneous exchange of witness statements by a specified date: see *Practice Direction--the Multi-track* (1999) PD 29 para 4.10(3). If a witness statement cannot be obtained, an application should be made to the court for permission to serve a witness summary: see CPR 32.9. If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission: CPR 32.10. As to hearsay evidence see the text and note 4 infra; as to compelling witnesses who refuse to give evidence voluntarily see CPR Pt 34 and note 10 infra; and as to adducing expert evidence see CPR Pt 35. Directions as to evidence at the trial will be given by the court on listing of the claim for trial: see CPR 29.8; *Practice Direction--the Multi-track* (1999) PD 29 para 9.2. See also PARA 295 post.

4 See the Civil Evidence Act 1995 s 1; and CIVIL PROCEDURE. For the procedural requirements see s 2; CPR 33.1-33.5; and CIVIL PROCEDURE. The requirement to give notice does not apply to a statement which a party to a probate claim wishes to put in evidence and which is alleged to have been made by the person whose estate is the subject of the proceedings: CPR 33.3(b). As to the court's overriding power to control the evidence see the text and note 1 supra.

5 As to the confidentiality of communications between solicitor and client see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 453; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741.

6 There is no privilege for documents in so far as they relate to the attestation and execution of a will: see PARA 303 post.

7 See *Russell v Jackson* (1851) 9 Hare 387; *Bullivant v A-G for Victoria* [1901] AC 196 at 206, HL, per Lindley LJ.

8 See *Rochevoucauld v Boustead* (1896) 65 LJ Ch 794; revsd on another point [1897] 1 Ch 196, CA.

9 See PARA 289 ante.

10 See CPR 34.2, 34.3. A summons to produce documents can order their production on the date fixed for the hearing or some other date (see CPR 34.2(4)), and a party to the claim may apply for an order for the examination of a witness before the hearing (see CPR 34.8).

11 See the decision of the Council of the Law Society stated in 56 Law Society's Gazette (September 1959) 619. See also *Re Sanders, Riches and Woodey v Sanders* (1961) 105 Sol Jo 324; *Larke v Nugus* (1979) 123 Sol Jo 337; and PARA 269 note 6 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/292. Discontinuance and dismissal.

292. Discontinuance and dismissal.

The rules which apply generally¹ to the withdrawal and discontinuance of proceedings do not apply to a probate claim². At any stage of probate proceedings the court may, on the application of the claimant or of any party to the probate claim who has acknowledged service of the claim form³, order the claim to be discontinued or dismissed on such terms as to costs or otherwise as it thinks just and may further order that a grant of probate of the will or letters of administration of the estate of the deceased person, as the case may be, which is the subject of the claim, be made to the person entitled to it⁴. The application may be made by application notice⁵. An order for the discontinuance or dismissal of a probate claim will normally lead to a grant of probate or of letters of administration in common form⁶.

1 See CPR Pt 38. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 12.1. For the meaning of 'probate claim' see PARA 76 note 2 ante.

3 For the meaning of 'claim form' see PARA 78 note 1 ante.

4 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 12.2.

5 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 12.3. For the application notice procedure see CPR Pt 23.

6 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 12.4.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

292 Discontinuance and dismissal

TEXT AND NOTES--Replaced. CPR Pt 38 does not apply to probate claims: CPR 57.11(1) (Pt 57 added by SI 2001/1388). At any stage of a probate claim the court, on the application of the claimant or of any defendant who has acknowledged service, may order that (1) the claim be discontinued or dismissed on such terms as to costs or otherwise as it thinks just; and (2) a grant of probate of the will, or letters of administration of the estate, of the deceased person be made to the person entitled to the grant: CPR 57.11(2). For the meanings of 'probate claim' and 'will' see PARA 277. The test to be applied when determining whether to discontinue probate proceedings is whether, viewed objectively, there is at the time of the discontinuance a serious issue to be resolved in relation to the will: *Wylde v Culver; Re Wylde* [2006] EWHC 1313 (Ch), [2006] 4 All ER 345.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/293. Striking out and summary judgment.

293. Striking out and summary judgment.

The court may strike out the whole or part of a statement of case if it appears to disclose no reasonable grounds for bringing or defending the claim, or to be an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings, or if it appears that there has been a failure to comply with a rule, practice direction or court order¹. In addition the court in probate proceedings has an inherent jurisdiction², in common with the courts in other civil proceedings, to stay proceedings which are frivolous and vexatious or an abuse of the process of the court³, but this jurisdiction is sparingly exercised and then only in exceptional and clear cases⁴. The court will consider for this purpose whether the claimant can by his action obtain any real or material advantage for himself or for others and whether at a later stage in proceedings the statutory rules on limitation or laches would be a conclusive defence⁵.

The court may give summary judgment against a claimant in a probate claim on the whole of the claim, or on a particular issue, if it considers that that claimant has no real prospect of succeeding on the claim or issue and there is no other reason why the case or issue should be disposed of at a trial⁶.

1 See CPR 3.4(1), (2). For the possible consequences of such an order and relief see CPR 3.4-3.9; and for the procedure see *Practice Direction--Striking out a Statement of Case* (1999) PD 3A. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante. The authorities tend to support the view that the court will never strike out a claim to revoke a grant of probate or letters of administration on the mere ground of delay in instituting it, unless it is satisfied that the claim is otherwise frivolous or vexatious or is for other reasons an abuse of the process of the court: see *Re Flynn, Flynn v Flynn* [1982] 1 All ER 882, distinguishing *Re Hassan* (1981) 78 LS Gaz 842. As to abuse of process by relitigating a probate claim see *Re Langton* [1964] P 163 at 179, [1964] 1 All ER 749 at 759, CA, per Diplock LJ.

2 See the Supreme Court Act 1981 s 49(3); CPR 3.4(5).

3 *Willis v Earl Beauchamp* (1886) 11 PD 59, CA. See also *Mohan v Broughton* [1899] P 211 (affd [1900] P 56, CA); *Mahon v Quinn* [1904] 2 IR 267; *Birch v Birch* [1902] P 130, CA. Cf *Peters v Tilly* (1886) 11 PD 145. See also CIVIL PROCEDURE.

4 *Re Coghlan, Briscoe v Broughton* [1948] 2 All ER 68 at 73, CA, per Tucker LJ. See also *Re Flynn, Flynn v Flynn* [1982] 1 All ER 882; and note 1 supra.

5 *Willis v Earl Beauchamp* (1886) 11 PD 59, CA; *Re Coghlan, Briscoe v Broughton* [1948] 2 All ER 68 at 74, CA, per Evershed LJ. The exercise of the jurisdiction is described as a 'drastic step': see *Re Coghlan, Briscoe v Broughton* supra at 76 per Hodson J. As to limitation generally see LIMITATION PERIODS. See also note 1 supra.

6 See CPR 24.2, 24.3(1). Summary judgment is not available against a defendant to a probate claim: CPR 24.3(2)(c). A counterclaim is to be treated as a claim for this purpose: see CPR 20.3. Where an order pronouncing for a will in solemn form is sought on an application for summary judgment, the evidence in support of the application must include an affidavit or a witness statement proving due execution of the will: *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 11. For the practice and procedure in summary judgment applications see CPR Pt 24; *Practice Direction--the Summary Disposal of Claims* (1999) PD 24; and CIVIL PROCEDURE.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

293 Striking out and summary judgment

TEXT AND NOTES--If an order pronouncing for a will in solemn form is sought on an application for summary judgment, the evidence in support of the application must include written evidence proving due execution of the will: *Practice Direction--Probate* PD 57 para 5.1. If a defendant has given notice in his defence under CPR 57.7(5) that he raises no positive case but (1) he insists that the will be proved in solemn form; and (2) for that purpose he will cross-examine the witnesses who attested the will, any application by the claimant for summary judgment is subject to the right of that defendant to require those witnesses to attend court for cross-examination: *Practice Direction--Probate* PD 57 para 5.2. For the meaning of 'will' see PARA 277.

TEXT AND NOTE 1--If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit, the court's order must record that fact and the court must at the same time consider whether it is appropriate to make a civil restraint order: CPR 3.4(6) (added by SI 2004/2072). For the meaning of 'civil restraint order' see PARA 720.

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTE 6--For 'reason' read 'compelling reason': CPR 24.2; SI 2000/1317.

NOTE 6--CPR Pt 24 amended: SI 2000/221. CPR 24.3(2)(c) revoked: SI 2000/2092. CPR 20.3 substituted: SI 2005/3515.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/294. Compromise.

294. Compromise.

Where, on a compromise of a probate action¹ in the High Court: (1) the court is invited to pronounce for the validity of one or more wills, or against the validity of one or more wills, or for the validity of one or more wills and against the validity of one or more other wills²; and (2) the court is satisfied that consent to the making of the pronouncement or, as the case may be, each of the pronouncements in question has been given by or on behalf of every relevant beneficiary³, the court may without more pronounce accordingly⁴. Alternatively, where the parties to a claim agree to a compromise, the court may order the trial of the claim on written evidence⁵.

Where all those who are interested are of full age and capacity and consent to a compromise, they may agree to any terms, subject to the legal requirements for proper proof or disproof of the validity of the testamentary document in any case where the statutory procedure⁶ for dispensing this is not available. If unascertained charities may be affected, the Attorney General must be made a party⁷.

The court may approve a compromise on behalf of minors, but it has no power to force one upon them against the opinion of their advisers⁸, and it will only approve such a compromise when proceedings have been commenced, and on proper evidence that the compromise is for their benefit⁹.

If in any proceedings concerning the estate of a deceased person¹⁰ a compromise is proposed the court may approve the compromise where some of the persons who are interested in it or may be affected by it (including unborn or unascertained persons) are not parties to the proceedings but either: (a) there is some other person in the same interest before the court who assents to the compromise or on whose behalf the court sanctions the compromise¹¹; or (b) the absent persons are represented by a duly appointed person¹² who assents to it¹³. In these circumstances, if the court is satisfied that the compromise will be for the benefit of the absent persons and that it is expedient to do so, it may approve the compromise and order that it is to bind those persons, who will then be bound accordingly except where the order was obtained by fraud or non-disclosure of material facts¹⁴.

1 'Probate action' means an action for a grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant, or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business: Administration of Justice Act 1985 s 49(2). 'Action' means any civil proceedings commenced by writ or in any other manner prescribed by rules of court: s 56. Since the enactment of the CPR, an action is now known as a claim and proceedings are commenced by claim form: see PARA 37 note 3 ante. See also CIVIL PROCEDURE. 'Will' includes a nuncupative will and any testamentary document of which probate may be granted: Administration of Justice Act 1985 s 56. As to the distinction between non-contentious and contentious business see PARA 80 ante.

2 Ibid s 49(1)(a).

3 Ibid s 49(1)(b). 'Relevant beneficiary', in relation to a pronouncement relating to any will or wills of a deceased person, means: (1) a person who under any such will is beneficially interested in the deceased's estate; and (2) where the effect of the pronouncement would be to cause the estate to devolve as on an intestacy (or partial intestacy), or to prevent it from so devolving, a person who under the law relating to intestacy is beneficially interested in the estate: s 49(2). As to the persons entitled on intestacy see PARA 583 et seq post.

4 Ibid s 49(1). Applications under s 49 may be heard by a master or district judge and should be supported by affidavit or witness statement identifying the relevant beneficiaries (see note 3 supra) and exhibiting their respective consents; affidavits or witness statements of testamentary scripts (see PARA 279 ante) will still be necessary: *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A paras 13.2, 13.3.

5 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 13.1. Such evidence remains necessary because the court itself has to be satisfied on some evidence even if the parties agree. The action is in a sense an action in rem: see PARA 296 note 1 post. As to trials on written evidence see PARA 285 ante.

6 See the text and notes 1-5 supra.

7 *Boughey v Minor* [1893] P 181; *Re King, Jackson v A-G* [1917] 2 Ch 420. See also CHARITIES vol 8 (2010) PARAS 598-599.

8 Cf *Re Birchall, Wilson v Birchall* (1880) 16 ChD 41, CA.

9 *Norman v Strains* (1880) 6 PD 219.

10 See CPR Sch 1 RSC Ord 15 r 13(1)(a); CPR Sch 2 CCR Ord 5 r 6(1)(a).

11 CPR Sch 1 RSC Ord 15 r 13(4)(a); CPR Sch 2 CCR Ord 5 r 6(3)(a).

12 le appointed under CPR Sch 1 RSC Ord 15 r 13(1); or CPR Sch 2 CCR Ord 5 r 6(1): see PARA 287 ante.

13 CPR Sch 1 RSC Ord 15 r 13(4)(b); CPR Sch 2 CCR Ord 5 r 6(3)(b).

14 CPR Sch 1 RSC Ord 15 r 13(4); CPR Sch 2 CCR Ord 5 r 6(3).

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

294 Compromise

TEXT AND NOTES--If at any time the parties agree to settle a probate claim, the court may (1) order the trial of the claim on written evidence, which will lead to a grant in solemn form; (2) order that the claim be discontinued or dismissed under CPR 57.11, which will lead to a grant in common form; or (3) pronounce for or against the validity of one or more wills under the Administration of Justice Act 1985 s 49: *Practice Direction--Probate* PD 57 para 6.1. Applications under the Administration of Justice Act 1985 s 49 may be heard by a master or district judge and must be supported by written evidence identifying the relevant beneficiaries and exhibiting the written consent of each of them; the written evidence of testamentary documents required by CPR 57.5 will still be necessary: *Practice Direction--Probate* PD 57 para 6.2. For the meanings of 'probate claim' and 'will' see PARA 277. For the meaning of 'testamentary document' see PARA 279.

TEXT AND NOTES 10-14--CPR Sch 1 RSC Ord 15 r 13, Sch 2 CCR Ord 5 r 6 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/295. Trial.

295. Trial.

The trial of a probate claim follows a similar course to any other civil claim¹. Jury trial of a probate claim is not available in the High Court², but is possible in the county court if fraud by a party to the proceedings is in issue³. The witnesses to the execution of the will are the court's witnesses and may be cross-examined by the party calling them⁴.

1 See CPR 32.1-32.5; Pt 39; *Practice Direction--the Multi-track* (1999) PD 29 paras 9, 10; *Practice Direction--Miscellaneous Provisions Relating to Hearings* (1999) PD 39A. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante. A witness statement will be treated as the witness's evidence in chief unless the court orders otherwise: CPR 32.5(2). A witness giving oral evidence at trial may with the permission of the court amplify his witness statement and give evidence in relation to new matters which have arisen since service of his witness statement (CPR 32.5(3)), but the court will give permission to do this only if it considers that there is good reason not to confine the witness's evidence to his witness statement (CPR 32.5(4)). As to the court's powers to control evidence and as to witness statements see PARA 291 ante.

2 The Supreme Court Act 1981 s 69 (see COURTS) governing jury trial in the High Court only applies to the Queen's Bench Division, while contentious probate is assigned to the Chancery Division: see PARA 274 ante.

3 See the County Courts Act 1984 s 66(3)(a); and COURTS. Jury trial can only be ordered if the party accused of fraud makes the application for such a trial, and it can still be refused if the court thinks that the trial requires prolonged examination of documents or accounts, or any scientific or local investigation, which cannot conveniently be made with a jury: see s 66(3); and COURTS.

4 See PARA 303 post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

295 Trial

NOTE 1--*Practice Direction--Miscellaneous Provisions Relating to Hearings* (1999) PD 39A amended.

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/296. Effect of judgment.

296. Effect of judgment.

A judgment in probate proceedings is binding not only on the parties to the claim, but on every person who has had notice of the claim, and has a right to intervene¹. Where, upon the facts

then known, he has no such right, he is not bound if other facts subsequently come to light². The court has power to order service of copies of the proceedings on non-parties in such a way that they are bound by the court's judgment if they do not become parties³, and to order that persons not parties to a claim be bound by a compromise⁴.

Where a county court makes an order for the grant or revocation of probate or administration the registrar of the county court transmits to the principal registry of the Family Division or a district probate registry, as he thinks convenient, a certificate under the court seal certifying that the order has been made, and on the application of a party in favour of whom the order has been made, a grant in compliance with the order is issued from the registry to which the certificate was sent or, as the case may require, the grant previously made is recalled or varied by the registry according to the effect of the order⁵.

1 *Newell v Weeks* (1814) 2 Phillim 224; *Ratcliffe v Barnes* (1862) 2 Sw & Tr 486; *Mecredy v Brown* [1906] 2 IR 437, CA; *Re Langton* [1964] P 163, [1964] 1 All ER 749, CA. See also *Dansereau v Berget* [1954] AC 1 at 8, [1953] 2 All ER 1058 at 1059, PC (grant of probate in England conclusive between contestants). A probate action has been said to be in a sense an action in rem: *Re Langton* supra at 175 and 757 per Danckwerts LJ. See also PARAS 269 note 5, 287 ante.

2 *Young v Holloway* [1895] P 87; *Re Langton* [1964] P 163 at 179, [1964] 1 All ER 749 at 759, CA, per Diplock LJ. As to the effect of fraud see PARAS 325-326 post; and CIVIL PROCEDURE vol 12 (2009) PARA 1204.

3 See PARA 287 ante.

4 See PARA 294 ante.

5 See the County Courts Act 1984 s 33 (as amended); and COURTS.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/297. Claims for revocation of a grant.

297. Claims for revocation of a grant.

If revocation of a grant of probate or letters of administration is disputed the procedure is by probate claim¹ and the grant must, if not already lodged in court², be lodged in the relevant office³. If the person to whom the grant was made is a claimant he must lodge the probate or letters of administration in the relevant office within seven days after the issue of the claim form⁴. If any defendant has the grant in his possession or under his control, he must lodge it in

the relevant office within 14 days after the service of the claim form on him⁵. If a person fails to comply with these requirements he may, on the application of any party to the claim, or by the court on its own initiative, be ordered to do so within a specified time, and will not be entitled to take any step in the proceedings without the court's permission until he has complied with the order⁶.

The plaintiff must allege as the ground for revoking the grant the invalidity of the will or the defendant's want of interest⁷. An claim for revocation which is groundless and vexatious may be stayed⁸, but it seems doubtful if the court would stay such a claim merely on the ground that the existence of laches would be likely to defeat subsequent proceedings to recover property⁹.

Every person entitled or claiming to be entitled to administer the estate of a deceased person under an unrevoked grant must be made a party to any probate claim seeking revocation of the grant¹⁰.

1 As to the contentious jurisdiction and procedure see PARA 274 et seq ante. For the meaning of 'probate claim' see PARA 76 note 2 ante. For the grounds for, and the effect of, revocation of a grant see PARA 256 et seq ante.

2 'Court' includes the principal registry of the Family Division or a district probate registry: *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 3.1. As to the transmission of documents see PARA 78 ante.

3 For the meaning of 'relevant office' see PARA 76 note 2 ante.

4 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 3.1(a).

5 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 3.1(b).

6 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 3.2, 3.3.

7 The claimant in revocation proceedings cannot limit his costs by the notice procedure: see PARA 283 ante.

8 *Willis v Earl Beauchamp* (1886) 11 PD 59, CA; *Mohan v Broughton* [1900] P 56, CA; *Mohan v Quinn* [1904] 2 IR 267; cf *Peters v Tilly* (1886) 11 PD 145; *Young v Holloway* [1895] P 87; *Re Coghlan, Briscoe v Broughton* [1948] 2 All ER 68, CA (applications for dismissals of actions on this ground rejected); *Re Langton* [1964] P 163, [1964] 1 All ER 749, CA. See also PARA 293 ante; and CIVIL PROCEDURE.

9 See *Re Coghlan, Briscoe v Broughton* [1948] 2 All ER 68, CA.

10 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 2.7.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

297 Claims for revocation of a grant

TEXT AND NOTES--Replaced. In a probate claim which seeks the revocation of a grant of probate or letters of administration every person who is entitled, or claims to be entitled, to administer the estate under that grant must be made a party to the claim: CPR 57.6(1) (Pt 57 added by SI 2001/1388). If the claimant is the person to whom the grant was made, he must lodge the probate or letters of administration in the relevant office when the claim form is issued: CPR 57.6(2). If a defendant has the probate or letters of administration under his control, he must lodge it in the relevant office when he acknowledges service: CPR 57.6(3). CPR 57.6(2), (3) do not apply where the grant has already been lodged at the court, which for these purposes includes the Principal Registry of the Family Division or a district probate registry: CPR 57.6(4). For the meaning of 'probate claim' and 'relevant office' see PARA 277.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/298. Rectification.

298. Rectification.

Where an application is made for the rectification of a will¹ and the grant has not been lodged in court, the procedure for lodging the grant in the relevant office² in probate claims for the revocation of a grant applies, with the necessary modifications, as if the proceedings were probate proceedings³. A copy of every order made for the rectification of a will must be sent to the principal registry of the Family Division for filing, and a memorandum of the order must be indorsed on, or permanently annexed to, the grant under which the estate is administered⁴.

1 Ie an application under the Administration of Justice Act 1982 s 20: see PARA 141 ante; and WILLS vol 50 (2005 Reissue) PARA 408. Such an application does not fall within the definition of 'probate claim' in *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 1.2 (see PARA 76 note 2 ante), although it would be possible to combine it with a probate claim. As to the procedure for obtaining rectification of a will in the Family Division where there is no dispute see PARA 141 ante.

2 Ie under *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 3: see PARA 297 ante. *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 17.1 refers to para 5, but it is submitted that this should read para 3. For the meaning of 'relevant office' see PARA 76 note 2 ante.

3 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 17.1. See note 2 supra.

4 *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 17.2.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

298 Rectification

TEXT AND NOTES--Replaced. Now, every personal representative of the estate must be joined as a party to a claim for the rectification of a will: CPR 57.12(1), (2) (Pt 57 added by SI 2001/1388). *Practice Direction--Probate* PD 57 makes provision for lodging the grant of probate or letters of administration with the will annexed in such a claim: CPR 57.12(1), (3). See *Practice Direction--Probate* PD 57 paras 9-11.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(3) PROCEDURE/299. Appeals.

299. Appeals.

Appeal from an order of a master or district judge¹ is to a judge, both in the High Court and the county court². Where a discretionary jurisdiction is given to the court, in the High Court the judge hearing such an appeal is in no way fettered by the previous exercise of the master's or district judge's discretion, and the judge is entitled to exercise his discretion as though the matter came before him for the first time³. In the county court the judge may only interfere with the exercise of a discretion by the district judge if he thinks that no reasonable district judge could have exercised his discretion as he did⁴.

Appeal lies to the Court of Appeal from any judgment or order of a judge in the High Court⁵, and from any determination of a judge or jury in the county court⁶. In the county court it is also possible to apply to the county court for a rehearing if no error of the court at the hearing is alleged⁷. The permission of the judge or the Court of Appeal is required for every appeal to the Court of Appeal, subject to certain exceptions including an appeal against a committal order⁸.

Where the appeal is from an order of the High Court, an appeal from the Court of Appeal lies by petition to the House of Lords, within six months from the date of the order or judgment, but only with the leave of the Court of Appeal or of the House of Lords⁹. In certain circumstances an appeal may be brought direct from the High Court to the House of Lords where a point of law of general public importance is involved¹⁰. There is no appeal from the decision of the Court of Appeal on any appeal from a county court in probate proceedings¹¹.

1 For the matters which are within the jurisdiction of the masters and district judges see *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B. These include most pre-trial orders and interim remedies, apart from injunctions: see PARAS 2, 3. A master or district judge may not try a case on the multi-track without the consent of the parties, unless it is a case proceeding under CPR Pt 8 (ie the procedure which dispenses with statements of case) or is an assessment of damages: see *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 4.1. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR Sch 1 RSC Ord 58 r 1; CPR Sch 2 CCR Ord 37 r 6. In the High Court, appeal from the master or district judge where he has tried the case or it is an assessment of damages is to the Court of Appeal: CPR Sch 1 RSC Ord 58 r 2.

3 *Evans v Bartlam* [1937] AC 473, [1937] 2 All ER 646, HL; *Practice Note* [1949] WN 475, CA.

4 See *Devenish v PDI Homes (Hythe) Ltd* [1959] 3 All ER 843, [1959] 1 WLR 1188, CA; *Woodspring District Council v Taylor* (1982) 4 HLR 95, CA.

5 See the Supreme Court Act 1981 s 16; and COURTS. For the procedure see CPR Sch 1 RSC Ord 59. As to costs in probate appeals see PARA 327 post.

6 See the County Courts Act 1984 s 77(1) (as amended); and COURTS. Under s 77(1) (as amended) appeal from the county court (subject to permission) may be on both law and fact as in the High Court: *O'Connor v Din* [1997] 1 FLR 226, CA, not following *Weinbaum v Klein* [1950] 1 All ER 353, CA, because the latter case related to the differently worded County Courts Act 1934 s 105 (repealed). For the procedure see CPR Sch 1 RSC Ord 59.

7 CPR Sch 2 CCR Ord 37 r 1(1). This provision does not apply if there was a jury trial. The application is made to the judge or district judge who tried the proceedings (r 1(2), (4)) and there is a 14 day time limit from the trial for applying (r 1(5)). This procedure, rather than appeal to the Court of Appeal, is the correct procedure to follow where a rehearing is sought on the grounds that fresh evidence has come to light: *O'Connor v Din* [1997] 1 FLR 226, CA.

8 See CPR Sch 1 RSC Ord 59 rr 1B, 14. As to the procedure for obtaining permission from the Court of Appeal see CPR Sch 1 RSC Ord 59 r 14; and CIVIL PROCEDURE. The other exceptions are appeal against a refusal to grant habeas corpus and an appeal against an order under the Children Act 1989 s 25 (as amended) (secure accommodation orders) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1037 et seq): see CPR Sch 1 RSC Ord 59 r 1B.

9 See COURTS.

10 See COURTS.

11 County Courts Act 1984 s 82.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

277-299 Procedure

As to procedural rules applicable to claims relating to the administration of estates of deceased persons see TRUSTS vol 48 (2007 Reissue) PARAS 1074-1079.

299 Appeals

TEXT AND NOTES 1-4--Replaced by the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071 (amended by SI 2002/439, SI 2003/490), made under the Access to Justice Act 1999 s 56(1). Subject to rules applying to a claim allocated to the multi-track or in specialist proceedings (see SI 2000/1071 art 4) and to rules applying to appeals from a decision which was itself made on appeal (see art 5), an appeal now lies to a judge of the High Court where the decision to be appealed is made by a master (ie a person holding office referred to in the Supreme Court Act 1981 Sch 2 Pt II) (now Senior Courts Act 1981 Sch 2 Pt II), a district judge of the High Court or a deputy of either of them: SI 2000/1071 art 2. 'Decision' includes any judgment, order or direction of the High Court or a county court: art 1(2)(a). For transitional provisions, see art 6.

Subject to arts 4, 5, an appeal lies from a decision of a county court to the High Court (art 3(1)), but, where the decision to be appealed is made by a district judge or deputy district judge of a county court, an appeal lies to a judge of a county court (art 3(2)). An appeal lies to the Court of Appeal where the decision to be appealed is a final decision (1) in a claim made under CPR Pt 7 and allocated to the multi-track under those rules; or (2) made in proceedings under the Companies Act 1985 or the

Companies Act 1989 or to which CPR Pt 57 Sections I-III or any of CPR Pts 58-63 applies: SI 2000/1071 art 4 (substituted by SI 2003/490). For the procedure applicable to appeals before the Court of Appeal see CPR Pt 52, *Practice Direction--Appeals* (2000) PD 52 (as amended), *Practice Note* [2001] 2 All ER 701, and *Practice Note* [2001] 3 All ER 479. 'Final decision' means a decision of a court that would finally determine, subject to any possible appeal or detailed assessment of costs, the entire proceedings whichever way the court decided the issues before it: SI 2000/1071 art 1(2)(c). A decision of a court is treated as a final decision where it (1) is made at the conclusion of part of a hearing or trial which has been split into parts; and (2) would, if made at the conclusion of that hearing or trial, be a final decision under art 1(2)(c): art 1(3).

Where (a) an appeal is made to a county court or the High Court, other than from the decision of an officer of the court authorised to assess costs by the Lord Chancellor; and (b) on hearing the appeal the court makes a decision, an appeal lies from that decision to the Court of Appeal and not to any other court: art 5.

NOTES 5, 6--The Supreme Court Act 1981 s 16(1) (now Senior Courts Act 1981 s 16(1)) and the County Courts Act 1984 s 77(1) now have effect subject to any order made by the Lord Chancellor under the Access to Justice Act 1999 s 56(1) (see TEXT AND NOTES 1-4): 1981 Act s 16(1) (amended by SI 2000/1071); 1984 Act s 77(1) (amended by SI 2000/1071). CPR Sch 1 RSC Ord 59 revoked: SI 2000/221.

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTE 7--CPR Sch 2 CCR Ord 37 r 1(1) revoked: SI 2000/221.

TEXT AND NOTE 8--Replaced by CPR Pt 52 (amended by SI 2000/2092). Permission is required for every appeal from a decision of a judge in a county court or the High Court, subject to certain exceptions, including an appeal against a committal order: CPR 52.3(1)(a). 'Judge' means, unless the context otherwise requires, a judge, master or district judge or a person authorised to act as such: CPR 2.3(1).

Such permission may be obtained from the lower court or from the appeal court (CPR 52.3(2)), save where the appeal is to the Court of Appeal from a county court or High Court decision which was itself made on appeal, in which case permission is required from the Court of Appeal (CPR 52.13(1)). The Court of Appeal will not give permission unless it considers that the appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it: CPR 52.13(2). 'Lower court' means the court, tribunal or other person or body from whose decision an appeal is brought; and 'appeal court' means the court to which an appeal is made: CPR 52.1(3)(b), (c). Where the lower court refuses permission, a further application may be made to the appeal court: CPR 52.3(3). Permission to appeal may be given only where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard: CPR 52.3(6) (amended by SI 2005/3515). An order giving permission may limit the issues to be heard and be made subject to conditions: CPR 52.3(7). For the procedure for obtaining permission see CPR 52.4, 52.5 and *Practice Direction--Appeals* (2000) PD 52 paras 4.1-5.25 (as amended). For the factors which may be taken into account when permission to appeal from a case management decision is being considered see *Practice Direction--Appeals* (2000) PD 52 paras 4.4, 4.5.

Every appeal is limited to a review of the decision of the lower court unless a practice direction makes different provision, or the court considers that, in the circumstances of an individual appeal, it would be in the interests of justice to hold a rehearing: CPR 52.11(1). Unless the appeal court orders otherwise, neither oral evidence nor evidence which was not below the lower court will be admitted: CPR 52.11(2). The appeal court will allow the appeal where the decision of the lower court was wrong, or was unjust

because of a serious procedural or other irregularity: CPR 52.11(3). For the powers of the appeal court, which include all those of the lower court, see CPR 52.10.

For transitional provisions see the Civil Procedure (Amendment) Rules 2000, SI 2000/221, art 39 (substituted by SI 2000/940).

NOTE 8--CPR Sch 1 RSC Ord 59 revoked: SI 2000/221. As to the other exceptions, see now CPR 52.3(1)(a).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(i) In general/300. Defences available.

(4) GROUNDS FOR OPPOSING PROBATE

(i) In general

300. Defences available.

Express provision¹ is made for statements of case in probate claims raising the defences of want of due execution², want of sound disposing mind³, want of knowledge and approval⁴, undue influence⁵ and fraud⁶. A defendant is not, however, now limited to these five defences, and he may, for example, contend that the alleged will was not a testamentary document, that it was revoked⁷, that the deceased was prevented by threats from altering his will, that the claimant is estopped, for example by a previous judgment⁸ from setting up the will, or that the deceased was a minor⁹ at the time the will purports to have been executed.

These defences may often overlap, but they should be separately stated¹⁰. In particular the contention that there was want of knowledge and approval will be a normal concomitant of the contention that there was want of sound disposing mind because if the latter contention is proved it will follow that there was want of knowledge and approval as well, but it is quite possible to know and approve the will when the volition is affected by undue influence or fraud¹¹.

1 See PARA 284 ante. As to counterclaims see PARA 282 ante; and as to default of statement of case see PARA 285 ante.

2 See PARAS 303-305 post.

3 See PARAS 306-315 post.

4 See PARAS 316-322 post.

5 See PARAS 323-324 post.

6 See PARAS 325-326 post.

7 As to the requirement of testamentary intention see WILLS vol 50 (2005 Reissue) PARA 350. As to the requisites for revocation see WILLS vol 50 (2005 Reissue) PARA 379 et seq.

8 As to the effect of a judgment see PARAS 287, 296 ante.

9 As to the general requirement that a testator must be of full age see PARA 103 ante. As to privileged wills see PARA 825 et seq ante.

10 See PARA 284 ante.

11 See PARA 324 post.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(i) In general/301. Part of will excluded.

301. Part of will excluded.

If the court is satisfied that only part of a will was obtained by undue influence or fraud¹, or that the testator did not have a sound disposing mind in regard to a particular part of a will², it may reject the part and pronounce for the rest of the will³. The converse is in general true if want of knowledge and approval is established⁴, but there are cases where part of a will may be excluded on grounds generally amounting merely to clerical error or inadvertence⁵.

1 *Barton v Robins* (1769) 3 Phillim 455n; *Billinghurst v Vickers (formerly Leonard)* (1810) 1 Phillim 187 at 199; *Allen v M'Pherson* (1847) 1 HL Cas 191; *Fulton v Andrews* (1875) LR 7 HL 448; *Farrelly v Corrigan* [1899] AC 563, PC.

2 Cf *Parker v Felgate* (1883) 8 PD 171 per Sir J Hannen P. As to want of sound disposing mind see PARA 306 et seq post.

3 See *Rhodes v Rhodes* (1882) 7 App Cas 192, PC; *Sarat Kumari Debi v Sakhi Chand* (1928) LR 56 Ind App 62, PC. As to the exclusion of words from probate see also PARA 139 ante.

4 See PARA 321 post. As to delusions see PARA 312 post.

5 See PARAS 139 ante, 321 post. As to rectification in these circumstances see PARA 141 ante; and WILLS vol 50 (2005 Reissue) PARA 408.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

301 Part of will excluded

NOTE 3--A court should not pronounce against part of a will as a means of expressing its disapproval of the propounder of the will: *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 2 All ER 87.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(i) In general/302. Medical evidence.

302. Medical evidence.

The value and function of medical evidence on the issues affecting testamentary capacity are sometimes difficult to assess. The personal medical knowledge of the testator's own doctor, or of a psychiatrist who has had the opportunity of examining the testator at the time of his will¹, must normally carry great weight. On the other hand little weight may be attached to the conclusions of an expert drawn from the evidence of others, especially if these conflict with the views of reliable laymen who knew the testator well. It is important in cases of doubt to try to have the proposed testator medically examined after some legal explanation of the criteria discussed in the paragraphs which follow². There is no specific diagnosis which necessarily denotes incapacity³, but while the world at large can only contrast the doubtful cases with the sane, the physician has at hand the alternative contrast with the insane⁴. A diseased state of mind once proved to have established itself is presumed to continue, and the burden of showing restored health falls on those who assert it⁵.

1 See PARA 309 note 2 post. Foreign law and medical knowledge on testamentary capacity are discussed in *Banks v Goodfellow* (1870) LR 5 QB 549 at 561 et seq.

2 See generally para 303 et seq post, and in particular para 309 note 2 post.

3 All diagnoses are matters of degree, and persons suffering from any one of such diagnoses may still be competent to make a will: *Smith v Tebbitt* (1867) LR 1 P & D 398 at 402, 421.

4 *Smith v Tebbitt* (1867) 1 P & D 398 at 404. An apparently extravagant version of this proposition was doubted in *Banks v Goodfellow* (1870) LR 5 QB 549 at 556, where the earlier cases are reviewed.

5 *Smith v Tebbitt* (1867) LR 1 P & D 398.

UPDATE

269-334 Contentious Probate

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(ii) Want of Due Execution/303. Evidence of execution.

(ii) Want of Due Execution

303. Evidence of execution.

Probate of a will may be opposed on the ground that the statutory requirements¹ for due execution have not been complied with. The evidence of one of the attesting witnesses, if he deposes to the due execution, is sufficient². It has been held that, if he fails to prove the due execution, the other attesting witness must be called, even though he may be an adverse witness³. The party calling an attesting witness is entitled to cross-examine him⁴, because the witness is a witness of the court and not the witness of one of the parties⁵. It follows that the court is entitled if it thinks fit to see documents which would otherwise under the general law be clearly entitled to privilege⁶. The court will not exclude further relevant evidence, other than that of the attesting witnesses, for the purpose of the statutory requirements is the prevention of fraud, and the exclusion of such evidence would increase the possibility of fraud⁷. If neither of the attesting witnesses can be found, or both are dead, any person who in fact saw the execution may be called⁸, and the court is entitled to read the affidavit of one of the attesting witnesses previously made upon the application for a grant in common form⁹.

Where the witnesses are dead, evidence may be admitted¹⁰ of persons who were told by one of the witnesses that she had witnessed the will¹¹.

The burden of proving due execution, whether by presumption¹² or by positive evidence, rests on the person setting up the will¹³.

1 As to the statutory requirements see PARA 103 note 4 ante; and WILLS vol 50 (2005 Reissue) PARA 351 et seq.

2 *Belbin v Skeats* (1858) 1 Sw & Tr 148; *Forster v Forster* (1864) 33 LJPM & A 113.

3 *Coles v Coles and Brown* (1866) LR 1 P & D 70; cf *Bowman v Hodgson* (1867) LR 1 P & D 362. In *Neal v Denston* (1932) 147 LT 460 the first of the attesting witnesses failed to satisfy the court that he had any useful recollection of the transaction, and the second attesting witness, who proved adverse to due execution, was called for the defence.

4 *Re Brock, Jones v Jones* (1908) 24 TLR 839; *Oakes v Uzzell* [1932] P 19. Cross-examination is not confined to the issue of due execution: see *Re Webster, Webster v Webster* [1974] 3 All ER 822n, [1974] 1 WLR 1641.

5 *Re Fuld, Hartley v Fuld* [1965] P 405 at 409-410, sub nom *Re Fuld (No 2), Hartley v Fuld* [1965] 2 All ER 657 at 658-659 per Scarman J. The court has an inquisitorial capacity: *Re Fuld, Hartley v Fuld* supra at 410 and 659. As to professional privilege see PARA 291 ante. The witnesses may be cross-examined to prove undue influence or fraud even if these issues are not raised in the statements of case: see *Wintle v Nye* [1959] 1 All ER 552 at 560, [1959] 1 WLR 284 at 294, HL. As to the contents of statements of case see PARA 284 ante.

6 See *Re Fuld, Hartley v Fuld* [1965] P 405, [1965] 2 All ER 657; and note 5 supra.

7 *Re Vere-Wardale, Vere-Wardale v Johnson* [1949] P 395, [1949] 2 All ER 250.

8 *Mackay v Rawlinson* (1919) 35 TLR 223.

9 *Gornall v Mason* (1887) 12 PD 142; cf *Hayes v Willis* (1906) 75 LJP 86; *Mackay v Rawlinson* (1919) 35 TLR 223 (undefended suit). Cf the Non-Contentious Probate Rules 1987, SI 1987/2024, r 12(1) (see PARA 133 ante).

10 Ie under the Civil Evidence Act 1995: see CIVIL PROCEDURE.

11 *Re Yelland, Broadbent v Francis* (1975) 119 Sol Jo 562. Cf para 110 ante.

12 As to the presumption of due execution see PARA 304 post.

13 *Clery v Barry* (1887) 21 LR Ir 152 at 155n, CA. Proof that the will was duly executed and that the testator knew and approved its contents may be assisted by the presumption: *Re Musgrove, Davis v Mayhew* [1927] P 264, CA.

UPDATE**269-334 Contentious Probate**

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(ii) Want of Due Execution/304. Presumption of due execution.

304. Presumption of due execution.

The principle *omnia praesumuntur rite esse acta*¹ applies where the will is regular on the face of it, with an attestation clause and the signatures of the testator and witnesses in their proper places². This presumption of due execution applies where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the will³, and even though the attestation clause appears only on the completed draft of a last will⁴. It applies where the testator's name has been affixed by his direction just as where he has himself written his name⁵. It may be rebutted by evidence of the attesting witnesses or otherwise, but the evidence as to some defect in execution must be clear, positive and reliable⁶, since the court ought to have the strongest evidence before it believes that a will, with a perfect attestation clause and signed by the testator, was not duly executed⁷. Where there is only an incomplete attesting clause it seems that the presumption applies, but with less force than where the attestation clause is in proper form⁸. Where both the attesting witnesses are dead and the will is in regular form the principle is applicable on proof of the handwriting⁹.

1 le the principle that all things are presumed to have been done rightly.

2 *Vinnicombe v Butler* (1864) 3 Sw & Tr 580 at 582 per Sir J Wilde; *Lloyd v Roberts* (1858) 12 Moo PCC 158; *Wright v Sanderson* (1884) PD 149, CA; and see *Harris v Knight* (1890) 15 PD 170, CA; *Re Musgrove, Davis v Mayhew* [1927] P 264, CA (no step taken to prove will for 20 years); *Scarff v Scarff* [1927] 1 IR 13, CA. As to proof of due execution see also PARA 133 ante.

3 *Woodhouse v Balfour* (1887) 13 PD 2; *Byles v Cox* (1896) 74 LT 222; *Re Webb, Smith v Johnston* [1964] 2 All ER 91, [1964] 1 WLR 509.

4 *Re Webb, Smith v Johnston* [1964] 2 All ER 91, [1964] 1 WLR 509. See also *Re Yelland, Broadbent v Francis* (1975) 119 Sol Jo 562; *Re Phibbs* [1917] P 93. As to lost wills see further PARA 110 ante.

5 *Clery v Barry* (1887) 21 LR Ir 152, CA.

6 *Croft v Croft* (1865) 4 Sw & Tr 10; *Glover v Smith* (1886) 57 LT 60; *Wyatt v Berry* [1893] P 5; *Pilkington v Gray* [1899] AC 401, PC; *Re Moore* [1901] P 44. In *Dayman v Dayman* (1894) 71 LT 699 the presumption prevailed against the testimony of both the attesting witnesses, and in *Wilson v Beddard* (1841) 12 Sim 28 at 34 Shadwell V-C suggested that the evidence of witnesses denying a solemn act which they had attested ought to receive the slightest possible attention, a suggestion cited apparently with approval by Lord Brougham in *M'Gregor v Topham* (1850) 3 HL Cas 132 at 156; contrast *Wright v Rogers* (1869) LR 1 P & D 678 at 682 (cited in *Re Vere-Wardale, Vere-Wardale v Johnson* [1949] P 395 at 396, [1949] 2 All ER 250 at 251), where Lord Penzance stated that, where both witnesses swear that the will was not duly executed and there is no evidence the other way, there is no footing for the court to affirm that the will was duly executed; see also *Re Strong, Strong v Hadden* [1915] P 211. In *Neal v Denston* (1932) 147 LT 460 the presumption prevailed where the recollection of

the attesting witnesses was doubted; see further PARA 305 post. In *Re Willis* (1960) Times, 5 April, the presumption was held not to apply against the evidence of both witnesses that the testator never signed in their presence; and in *Re Parslow, Parslow v Parslow* (1959) Times, 3 December, the presumption was rebutted by evidence from a handwriting expert that the attestation was forged by the testatrix.

7 *Wright v Rogers* (1869) LR 1 P & D 678 at 682; *O'Meagher v O'Meagher* (1883) 11 LR Ir 117; *Whiting v Turner* (1903) 89 LT 71; and see *Goodisson v Goodisson* [1913] 1 IR 31 (on appeal [1913] 1 IR 218, CA); *Dubourdieu v Patterson* (1919) 54 ILT 23 (evidence that witnesses did not see testatrix sign; will not set aside); *Weatherhill v Pearce* [1995] 2 All ER 492, [1995] 1 WLR 592 (will upheld despite evidence from witnesses casting some doubt on validity of attestation); *Re Chapman, National Trust for Places of Historic Interest and National Beauty v Royal National Institute for the Blind* [1999] 5 CL 566.

8 *Vinnicombe v Butler* (1864) 3 Sw & Tr 580 at 582; *Re Rees* (1865) 34 LJP & A 56; see also *Clarke v Clarke* (1879) 5 LR Ir 47, CA (attestation by marks); *Burgoyne v Showler* (1844) 1 Rob Eccl 5; *Byles v Cox* (1896) 74 LT 222 (no attestation clause; presumption applied on proof of signature of testator and one witness and some other affirmative evidence).

9 *Burgoyne v Showler* (1844) 1 Rob Eccl 5; *Re Thomas* (1859) 1 Sw & Tr 255; *Re Rees* (1865) 34 LJP & A 56; *Re Spain* (1915) 31 TLR 435.

UPDATE

269-334 Contentious Probate

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(ii) Want of Due Execution/305. Faulty memory or death of witness.

305. Faulty memory or death of witness.

In a contested claim the court will scrutinise the evidence of an attesting witness which tends to prove absence of due execution with great care, and, if his recollection is faulty or negative, or if he shows any hostile animus, will be disposed to put his evidence aside and act on the presumption that the will is good¹.

The presumption of due execution may be applied where there is no attestation clause and the attesting witnesses are dead², but this is only done in case of a failure of evidence as to circumstances of the signing and attestation³.

1 *Blake v Knight* (1843) 3 Curt 547; *Burgoyne v Showler* (1844) 1 Rob Eccl 5 at 11 per Dr Lushington; *Thomson v Hall* (1852) 2 Rob Eccl 426; *Gwillim v Gwillim* (1859) 3 Sw & Tr 200; *Re Gunstan, Blake v Blake* (1882) 7 PD 102 at 115, CA, per Holker LJ; *Wright v Sanderson* (1884) 9 PD 149 at 160, CA, per Lord Selborne; *Woodhouse v Balfour* (1887) 13 PD 2; *Re Moore* [1901] P 44; *Neal v Denston* (1932) 147 LT 460. See also *Cooper v Bockett* (1846) 4 Moo PCC 419; *Lloyd v Roberts* (1858) 12 Moo PCC 158; *Re Benjamin* (1934) 150 LT 417; *Weatherhill v Pearce* [1995] 2 All ER 492, [1995] 1 WLR 592.

2 *Re Peverett* [1902] P 205; *Trott v Skidmore* (1860) 2 Sw & Tr 12; *Re Malins* (1887) 19 LR Ir 231. See also *Re Denning, Harnett v Elliott* [1958] 2 All ER 1, [1958] 1 WLR 462, where two unexplained names on the back of the document were inferred to be there for purposes of attestation.

3 See *Re Strong, Strong v Hadden* [1915] P 211; *Rolleston v Sinclair* [1924] 2 IR 157, CA; *Scarff v Scarff* [1927] 1 IR 13, CA. A will which has been lost or accidentally destroyed may be admitted to probate if it is

established that there was a proper attestation clause, and that the will purported to be attested by two witnesses, although there is no evidence as to who they were: *Re Phibbs* [1917] P 93. See also PARAS 110, 303-304 ante.

UPDATE

269-334 Contentious Probate

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(iii) Want of Sound Disposing Mind/A. IN GENERAL/306. Persons of full age and sound mind.

(iii) Want of Sound Disposing Mind

A. IN GENERAL

306. Persons of full age and sound mind.

The burden of proving testamentary capacity falls on the person propounding the will, but this burden is satisfied prima facie in the case of a competent testator by proving that he executed it¹. A person² of full age and sound mind may make a valid will and there is today no restriction on the testamentary capacity of persons convicted of crimes³ and virtually no restriction on the capacity of aliens as such⁴. It is in general not nationality but, in the case of immovables, the *lex situs*, and in the case of movables, the law of the deceased's domicile at the date of his death, that governs testamentary capacity in the case of a will with a foreign element⁵.

1 *Cleare v Cleare* (1869) LR 1 P & D 655 at 657 (in which Lord Penzance appears to have treated questions of capacity and knowledge and approval on the same footing). As to the date at which capacity must exist see PARA 310 post.

2 Former incapacities of married women were abolished by the Law Reform (Married Women and Tortfeasors) Act 1935 ss 1, 2(1) (as originally enacted).

3 See *Re Crippen* [1911] P 108. There seems never to have been any personal incapacity to prevent a convicted person making a will, but, until the abolition of forfeiture of property, a person convicted of treason or felony or attainted ceased to have any property on which a will could operate: see 2 Bl Com (14th Edn) 498. Forfeiture of property on conviction of treason or felony was abolished by the Forfeiture Act 1870 s 1 (repealed). So much of the punishment for any offence as consisted of any general forfeiture of land, goods or chattels was abolished by s 7(5) (repealed).

4 See the Status of Aliens Act 1914 s 17 (as amended); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13. An alien's freedom of testamentary disposition does not, however, extend to any interest in real or personal property to which any person has or may become entitled by reason of any disposition made on death occurring before 12 May 1870: see s 17 proviso (5); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13.

5 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 449 et seq.

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307. Immaturity.

A minor who is a soldier, sailor or airman may in certain circumstances make a valid will¹, but otherwise a minor cannot² make a valid will³.

It is a question of fact whether an adult with learning difficulties has the capacity to make a will⁴.

1 See PARAS 113-117 ante.

2 He where his capacity to make a will is governed by English domestic law: see the enactments cited in note 3 infra. As to capacity in the case of a will where there is a foreign element see PARA 306 ante. The age of majority in English law is 18, and is attained on the commencement of the eighteenth anniversary of a person's birth: see the Family Law Reform Act 1969 ss 1(1), 9(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 1-2.

3 See the Wills Act 1837 s 7 (as amended) (see WILLS vol 50 (2005 Reissue) PARA 323) by which no will made by a person under the age of 18 is valid. The monarch is in legal contemplation never a minor (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 40; CROWN AND ROYAL FAMILY vol 12(1) (Reissue) PARA 12), but no grant is in any case made to the estate of a deceased British monarch: see PARA 186 ante. As to the capacity of a minor to be a witness to the execution of a will see WILLS vol 50 (2005 Reissue) PARA 370.

4 The majority of adults with learning difficulties remain at the same level of impaired function, but where normal intellectual function is disordered by psychopathic personality maturity may eventually be achieved at an age greater than 18.

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(iii) Want of Sound

Disposing Mind/B. NECESSITY FOR SOUND DISPOSING MIND/308. Soundness of mind, memory and understanding.

B. NECESSITY FOR SOUND DISPOSING MIND

308. Soundness of mind, memory and understanding.

It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding. These words have consistently been held to mean sound disposing mind, and to import sufficient¹ capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature². Apart from persons who cannot make a valid will through unsoundness of mind³ in the ordinary sense of that term, a person who is born deaf, dumb and blind has been said to be incapable of so doing⁴. Moreover, a person who is born deaf and dumb, but not blind, is *prima facie* incapable⁵, but he can make a valid will if he is shown to have capacity and to understand what is written down⁶. Dementia arising from advanced age or produced by alcoholism or any other cause may destroy testamentary power⁷.

¹ The question of capacity is almost always one of degree and does not depend solely on scientific or legal definition: see *Boyse v Rossborough* (1857) 6 HL Cas 2 at 45; *Boughton v Knight* (1873) LR 3 P & D 64 at 67; *Burdett v Thompson* (1873) LR 3 P & D 72n.

² *Shep Touch* (8th Edn) 403; *Marquess of Winchester's Case* (1598) 6 Co Rep 23a; *Hastilow v Stobie* (1865) LR 1 P & D 64 at 68. As to the power of the Court of Protection to order the execution of a will for a patient see PARA 311 note 4 post.

³ See Bac Abr, Idiots and Lunatics (F); Bac Abr, Wills (B). As to delusion as the test of insanity see PARA 312 post.

⁴ *Jarman on Wills* (1st Edn) 29; *Jarman on Wills* (8th Edn) 50; and see Co Litt 42b. Cf, however, the example of Mary Kenny, who was able to write a book although she became deaf, dumb and blind at a very early age. See also PARA 302 ante.

⁵ *Swinburne on Wills* (7th Edn) Pt II s 10.

⁶ *Re Harper* (1843) 6 Man & G 732 (deed); *Swinburne on Wills* (7th Edn) Pt II s 4 pl 2; s 10 pl 2. As to the evidence required see *Re Owston* (1862) 2 Sw & Tr 461; *Re Geale* (1864) 3 Sw & Tr 431.

⁷ See *Ridgeway v Darwin* (1802) 8 Ves 65; *Ex p Cranmer* (1806) 12 Ves 445 at 452; *Sherwood v Sanderson* (1815) 19 Ves 280 at 283; *Griffiths v Robins* (1818) 3 Madd 191. As to the effect of alcohol see in particular *Ayrey v Hill* (1824) 2 Add 206 at 209-210; and *Re Heinke, Westminster Bank Ltd v Massey* (1959) Times, 21 January. As to epilepsy see *Foot v Stanton* (1856) Dea & Sw 19. For a discussion of the degree of dementia necessary to render the testator incapable see *Ingram v Wyatt* (1828) 1 Hag Ecc 384 at 400 (revsd on the facts, but not as to capacity, sub nom *Wyatt v Ingram* (1831) 3 Hag Ecc 466). See also PARA 313 post. As to medical evidence see PARA 302 ante.

UPDATE

269-334 Contentious Probate

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(iii) Want of Sound Disposing Mind/B. NECESSITY FOR SOUND DISPOSING MIND/309. Meaning of 'sound disposing mind'.

309. Meaning of 'sound disposing mind'.

In order to be of sound disposing mind a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent¹ of his property and the nature of the claims of others whom by his will he is excluding from participation in that property². Mere forgetfulness to comprehend some property, or to recollect the claims of those excluded, would not seem sufficient to invalidate the will, unless such forgetfulness establishes incapacity to remember sufficient facts to displace illusory notions and beliefs³. It is essential that no disorder of the mind should poison his affections, pervert his sense of right or prevent the exercise of his natural faculties, that no delusion should influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made⁴. Perversion of moral feeling does not constitute unsoundness of mind⁵. Eccentricity alone does not prevent a man from disposing of his property by will⁶; and the extravagance of the provisions of a will is not necessarily in itself conclusive evidence of unsoundness of mind⁷. It is not necessary that a testator should view his will with the eye of a lawyer and comprehend its provisions in their legal form⁸.

1 It has been objected that there is not a single case of incapacity decided on the ground that the testator did not understand the extent of the property of which he was disposing (see 35 Conveyancer (NS) (July-August 1971) 303) but the statement of the law set out in the text has stood otherwise unchallenged, and a contrary proposition would seem to conflict with the assumptions behind the former rule that a will disposed only of property existing at the date of the will. This rule was changed by the Wills Act 1837 ss 3, 24 (as originally enacted): see *Re Portal and Lamb* (1885) 30 ChD 50 at 55, CA, per Lindley LJ.

2 Medical evidence is often necessary. The test would seem to be whether there is sufficient capacity in the areas most relevant to making the will. From the authorities these can be listed as: (1) understanding that by the will he is disposing of his property on his death to objects of his regard; (2) knowledge of the probable extent and value of the property being disposed of at the time of the will; (3) appreciation of the possible moral claims of relatives and others not benefited by the will; and (4) sufficient memory at least to react when reminded of facts relevant to these areas.

Where the opportunity occurs, a psychiatric examination as to these matters to ascertain the degree of capacity in the proposed testator will reduce the risk that the will may be disputed. As to medical evidence see further PARA 302 ante. It has been said that, if distinctions can be drawn between various degrees of soundness of mind, then whatever is the highest degree of soundness is required to make a will: *Burdett v Thompson* (1873) LR 3 P & D 72n at 73n per Sir J Hannen, explaining dicta by him in *Boughton v Knight* (1873) LR 3 P & D 64 at 72. See also *Re Park, Park v Park* [1954] P 112, [1953] 2 All ER 1411, CA, which disapproves the view that making a will involves a higher degree of mental capacity than marriage as a general proposition, while recognising that different acts may require different levels of mental capacity (eg a complicated as compared with a simple will).

3 *Harwood v Baker* (1840) 3 Moo PCC 282 at 291; *Banks v Goodfellow* (1870) LR 5 QB 549 at 569; *Burdett v Thompson* (1873) LR 3 P & D 72n; *Re Belliss, Polson v Parrott* (1929) 45 TLR 452 (failure of a testatrix aged 93 to remember past dispositions to her daughters); *Battan Singh v Amirchand* [1948] AC 161 at 170, [1948] 1 All ER 152 at 155-156, PC.

4 *Banks v Goodfellow* (1870) LR 5 QB 549 at 565; and see *Hope v Campbell* [1899] AC 1, HL.

5 *Frere v Peacocke* (1846) 1 Rob Eccl 442 at 456.

6 *Pilkington v Gray* [1899] AC 401 at 407, PC. The mind does not have to be perfectly balanced: *Boughton v Knight* (1873) LR 3 P & D 64 at 66.

7 *Austen v Graham* (1854) 8 Moo PCC 493. However, the rationality of a will, if made without assistance, may be strong evidence that it was executed in a lucid interval: see also PARA 310 note 1 post.

8 *Banks v Goodfellow* (1870) LR 5 QB 549 at 567.

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269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

309 Meaning of 'sound disposing mind'

NOTE 4--See also *Sharp v Adam* [2006] EWCA Civ 449, [2006] WTLR 1059 (mood, as much as cognition, a factor).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(iii) Want of Sound Disposing Mind/B. NECESSITY FOR SOUND DISPOSING MIND/310. Time at which capacity must exist.

310. Time at which capacity must exist.

The sound disposing mind and memory must exist at the actual moment of execution of the will¹, but the measure of testamentary capacity need not be as complete at the time of execution as it was at the time of giving instructions for the will², and it would seem that when a will has been drawn in accordance with the instructions of the testator, while of sound disposing mind, a perfect understanding of all the terms of the will at the time of execution may not be necessary³. It also seems that clauses introduced by a solicitor after taking instructions and not subsequently acknowledged or approved will be rejected⁴. Where the testator's understanding of the will at the time of execution is doubtful, proof of mere execution is insufficient⁵.

1 See *Billinghurst v Vickers (formerly Leonard)* (1810) 1 Phillim 187; *Wood v Wood* (1811) 1 Phillim 357. See also *Eady v Waring* [1974] 2 OR (2d) 627, Ont CA. As to lucid intervals see *Cartwright v Cartwright* (1793) 1 Phillim 90 at 100; *Banks v Goodfellow* (1870) LR 5 QB 549 at 557; and see PARA 315 post.

2 It has been said that the principle stated in the text should be applied with the greatest caution when the testator does not himself give instructions to the solicitor but gives them to a lay intermediary who repeats them to the solicitor; in such a case, before presuming validity, the court must be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were clearly understood and faithfully reported by him and rightly apprehended by the solicitor: *Battan Singh v Amirchand* [1948] AC 161 at 169, [1948] 1 All ER 152 at 155, PC.

3 *Bennet v Duke of Manchester* (1854) 23 LTOS 331; *Parker v Felgate* (1883) 8 PD 171; *Perera v Perera* [1901] AC 354, PC; *Re Wallace, Solicitor of the Duchy of Cornwall v Batten* [1952] 2 TLR 925; and see *Thomas v Jones* [1928] P 162.

4 *Parker v Felgate* (1883) 8 PD 171 at 174 per Hannen P.

5 *Billinghurst v Vickers (formerly Leonard)* (1810) 1 Phillim 187 at 200.

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310 Time at which capacity must exist

NOTE 1--See also *Baker v Baker* [2008] EWHC 937 (Ch), [2008] 3 FCR 547; and *Scammell v Farmer* [2008] EWHC 1100 (Ch), [2008] WTLR 1261, [2008] All ER (D) 296 (Mar).

NOTE 3--See also *Clancy v Clancy* [2003] EWHC 1885 (Ch), [2003] All ER (D) 536 (Jul); and *Re Perrins; Perrins v Holland* [2009] EWHC 1945 (Ch), [2009] WTLR 1387, [2009] All ER (D) 30 (Aug).

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311. Wills made during incapacity.

A will made during a period of incapacity is void¹, and where a person is handicapped by mental illness to the extent that his estate has been or could have been made subject to the control of the court², but nevertheless purports to make a will, letters of administration will be granted as in the case of intestacy³. A will executed during incapacity does not become valid by the testator's subsequent recovery⁴. A will may be admitted to probate and a codicil, executed shortly afterwards, refused probate on the ground of a lack of sound disposing mind at the time of execution of the codicil⁵.

There is provision for the Court of Protection to inquire whether any person has in his possession or control or has knowledge of any testamentary document executed by a patient, and to direct its production⁶.

1 Swinburne on Wills (7th Edn) Pt II ss 3, 4. As to medical evidence of incapacity see PARA 302 ante.

2 It has been said that the need for control of the court is not a good test especially in the case of delusions which can be harmless: see *Re Bohrmann, Caesar and Watmough v Bohrmann* [1938] 1 All ER 271 at 276 per Langton J. As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 676.

3 *Re Rich* [1892] P 143. When a patient whose estate is subject to the control of the court wants to make a will the matter should be brought before the master for directions, and evidence should be furnished that the patient is of capacity to understand the nature of the document proposed to be executed, the extent of the property to be disposed of, and the claims of those it is proposed to benefit or exclude: *Practice Note* [1935] WN 54; Heywood and Massey's Court of Protection Practice (12th Edn) 189. In the absence of such directions it is not the practice to allow costs to solicitors in connection with the preparation of such documents: *Practice Note* supra.

4 *Arthur v Bokenham* (1708) 11 Mod Rep 148 at 157; *Shep Touch* (8th Edn) 413. Re-execution alone can validate a will made during incapacity: see *Willock v Noble* (1875) LR 7 HL 580 at 591 per Lord Cairns LC. Where a patient lacks testamentary capacity, a will may, in certain circumstances, be made on his behalf: see the

Mental Health Act 1983 ss 96(1)(e), (4), 97, 98; the Court of Protection Practice Note PN9 (Applications for the Execution of Statutory Wills and Codicils and for Gifts, Settlements and other similar dealings); and MENTAL HEALTH vol 30(2) (Reissue) PARAS 610, 695-696.

5 *Brouncker v Brouncker* (1812) 2 Phillim 57.

6 See the Court of Protection Rules 1994, SI 1994/3046, r 72; and MENTAL HEALTH vol 30(2) (Reissue) PARA 733.

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312. Delusions.

Unsoundness of mind exists where there is a defect of reason, consisting in its total or partial absence or in its disturbance. It is frequently marked by the existence of delusion, that is, belief in facts which no rational person could believe¹. It has been said that delusion is the test of insanity² and that the absence or presence of delusion, in the sense of an unreasoned belief in the existence of something extravagant which has no existence save in the patient's heated imagination, forms the true and only test or criterion of the absence or presence of insanity. Delusion in this sense, and insanity are convertible terms³.

The existence of a delusion compatible with the retention of the general powers and faculties of the mind is not, however, sufficient to overthrow the will, unless the delusion is such as was calculated to influence the testator in making it⁴. Therefore, the mere existence of a delusion in the mind of a person making a disposition is not sufficient to avoid it, even though connected with the subject matter of the disposition, but, once a delusion has been shown to exist, the burden of proving capacity is on the person insisting on the disposition⁵. It is a question of fact whether the delusion affected the disposition⁶.

1 *Dew v Clark and Clark* (1826) 3 Add 79 at 90; *Boughton v Knight* (1873) LR 3 P & D 64 at 67; *Sivewright v Sivewright's Trustees* 1920 SC (HL) 63 at 64.

2 See *Dew v Clark and Clark* (1826) 3 Add 79 at 90; *Boughton v Knight* (1873) LR 3 P & D 64 at 67; *Sivewright v Sivewright's Trustees* 1920 SC (HL) 63 at 64.

3 See *Boughton v Knight* (1873) LR 3 P & D 64 at 68-69 per Sir J Hannen, quoting *Dew v Clark and Clark* (1826) 3 Add 79 at 90 per Sir J Nicholl.

4 *Banks v Goodfellow* (1870) LR 5 QB 549 at 571, followed in *Murfett v Smith* (1887) 12 PD 116, DC; *Smee v Smee* (1879) 5 PD 84 at 91.

5 *Waring v Waring* (1848) 6 Moo PCC 341; *Smith v Tebbitt* (1867) LR 1 P & D 398 (delusion that testator was the Holy Ghost); and see *Jenkins v Morris* (1880) 14 ChD 674, CA.

6 See *Dew v Clark and Clark* (1826) 3 Add 79 at 90, where the delusion was held to avoid the will. If a delusion affects only one clause of a will, the will is valid with the exception of that clause: *Re Bohrmann, Caesar and Watmough v Bohrmann* [1938] 1 All ER 271. See also PARA 302 ante.

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313. Senile incapacity.

In cases where unsoundness of mind arises from want of intelligence or memory occasioned by defective organisation, supervening physical infirmity or the decay of advancing age, as distinguished from a functional mental illness, that defect of intelligence or memory is also a cause of incapacity. In these cases, however, although the mental power may be reduced below the ordinary standard, yet if there is sufficient intelligence to understand and appreciate the testamentary act in its different bearings, and sufficient memory to react when prompted, the power to make a will remains¹.

1 *Banks v Goodfellow* (1870) LR 5 QB 549 at 564, 566, 568; *Battan Singh v Amirchand* [1948] AC 161, [1948] 1 All ER 152, PC. Senility involves a global impairment of functions leading to deterioration in personal habits and sensibility as well as intelligence and memory. There is a simple medical rating scale available to show degrees of functional incapacity as well as numerous memory tests. See also PARAS 308 note 7, 309 note 2 ante.

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314. General burden of proof.

Generally speaking, the law presumes capacity, and no evidence is required to prove the testator's sanity, if it is not impeached¹. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. However, it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively². The issue of capacity is one of fact³. The burden of proof of sanity is considerably increased when it appears that the testator had been subject to previous unsoundness of mind⁴. The justice or injustice of the disposition may throw some light upon the question of the testator's capacity⁵. The testator's suicide shortly after making the will raises no presumption of insanity if there is no other evidence of insanity⁶. The court will not reject a will merely because it 'sounds to folly' without evidence of insanity⁷. Parol or documentary evidence will be admitted to show that the will expresses the testator's deliberate intention; all statements of his, whether oral or written, preparatory to making his will, and his conduct generally in relation to it, are of importance to show whether in fact he was aware of the character of the act which he was performing⁸. A rational act rationally done affords strong evidence of his capacity to make a will⁹.

1 *Steed v Calley* (1836) 1 Keen 620 at 635.

2 *Sutton v Sadler* (1857) 5 WR 880; *Symes v Green* (1859) 1 Sw & Tr 401 at 402; *Smith v Tebbitt* (1867) LR 1 P & D 398 at 436; *Keays v M'Donnell* (1872) IR 6 Eq 611; *Smee v Smee* (1879) 5 PD 84 at 91; and see *Harris v Ingledew* (1730) 3 P Wms 91 at 93; *Wallis v Hodgeson* (1740) 2 Atk 56; *Waring v Waring* (1848) 6 Moo PCC 341 at 355; *Cleare v Cleare* (1869) LR 1 P & D 655 at 657; *Earl of Longford v Purdon* (1877) 1 LR Ir 75. As to an attesting witness impeaching the will see PARAS 303-304 ante.

3 *Earl of Longford v Purdon* (1877) 1 LR Ir 75 at 79; *Sutton v Sadler* (1857) 5 WR 880.

4 *Smee v Smee* (1879) 5 PD 84; *Groom v Thomas* (1829) 2 Hag Ecc 433; *Re Watts* (1837) 1 Curt 594; *Snook v Watts* (1848) 11 Beav 105; *Bannatyne v Bannatyne* (1852) 2 Rob Eccl 472 at 447. As to the burden of proof where the will is made in a lucid interval see PARA 315 post.

5 *Harwood v Baker* (1840) 3 Moo PCC 282 at 291.

6 *Burrows v Burrows* (1827) 1 Hag Ecc 109.

7 *Arbery v Ashe* (1828) 1 Hag Ecc 214.

8 *Wheeler and Batsford v Alderson* (1831) 3 Hag Ecc 574; *Butlin v Barry* (1837) 1 Curt 614 at 629; *Durling and Parker v Loveland* (1839) 2 Curt 225; and see *Levy v Lindo* (1817) 3 Mer 81 at 85.

9 *Cartwright v Cartwright* (1793) 1 Phillim 90 at 100; and see *Clarke v Lear and Scarwell* (1791) cited in 1 Phillim at 119; *Williams v Goude* (1828) 1 Hag Ecc 577; *Rutherford v Maule* (1832) 4 Hag Ecc 213 at 226.

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315. Burden of proof where will made in lucid interval.

Once incapacity before the date of the will has been established, the burden lies on the party propounding the will to show that it was made after recovery or during a lucid interval and is therefore valid¹. In such a case the will should be regarded with great distrust, and every presumption should in the first instance be made against it², especially where the will is one in which natural affection and claims of near relationship have been disregarded³. It is not, however, necessary in order to constitute a lucid interval that the testator should be restored to as vigorous or active a state of intellect as he enjoyed before his incapacity⁴.

1 Swinburne on Wills (7th Edn) Pt II s 3; *Rodd v Lewis* (1755) 2 Lee 176; *Cartwright v Cartwright* (1793) 1 Phillim 90 at 100; *Groom v Thomas* (1829) 2 Hag Ecc 433; *Re Watts* (1837) 1 Curt 594; *Bannatyne v Bannatyne* (1852) 2 Rob Eccl 472 at 477; *Nichols and Freeman v Binns* (1858) 1 Sw & Tr 239; *Smee v Smee* (1879) 5 PD 84; *Re Walker, Watson v Treasury Solicitor* (1912) 28 TLR 466; and see *Hall v Warren* (1804) 9 Ves 605 (contract); *Snook v Watts* (1848) 11 Beav 105 (deeds).

2 *Banks v Goodfellow* (1870) LR 5 QB 549 at 570.

3 Ie what was in *Banks v Goodfellow* (1870) LR 5 QB 549 at 570 called an inofficious will.

4 *Ex p Holyland* (1805) 11 Ves 10 at 11; *Creagh v Blood* (1845) 8 I Eq R 434 at 439.

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(iv) Want of Knowledge and Approval

316. Knowledge and approval essential.

Probate of a will may also be opposed on the ground of the testator's want of knowledge and approval by evidence of circumstances attending or at least relevant to the preparation and execution of the will¹. It is essential to the validity of a will that the testator should have known and approved of its contents at the time of its execution². The burden of proving these facts is assumed by everyone who propounds a will, but the burden is satisfied *prima facie* in the case of a competent testator by proving that he executed the will³.

Where want of knowledge and approval is contended for in a statement of case, no allegation may be made in support of that contention which would be relevant to contentions of want of due execution⁴, want of soundness of mind⁵, undue influence⁶ or fraud⁷, unless the other contention is also made in the statement of case⁸.

1 *Re Musgrove, Davis v Mayhew*[1927] P 264 at 280, CA; *Re R*[1951] P 10 at 17, [1950] 2 All ER 117 at 121.

2 *Hastilow v Stobie*(1865) LR 1 P & D 64; *Guardhouse v Blackburn*(1866) LR 1 P & D 109.

3 *Barry v Butlin* (1838) 2 Moo PCC 480; *Cleare v Cleare*(1869) LR 1 P & D 655 (see PARA 306 note 1 ante); *Wintle v Nye*[1959] 1 All ER 552, [1959] 1 WLR 284, HL; *Re Fuld (No 3)*, *Hartley v Fuld*[1968] P 675, [1965] 3 All ER 776.

4 See PARA 303 ante.

5 See PARA 306 ante.

6 See PARA 323 post.

7 See PARA 325 post.

8 See *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3; and PARA 284 ante. See also *Re Preston* (1950) 94 Sol Jo 518, CA; *Re R*[1951] P 10 at 20-21, [1950] 2 All ER 117 at 123-124; *Re Stott, Klouda v Lloyds Bank Ltd*[1980] 1 All ER 259, [1980] 1 WLR 246.

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317. Presumption of knowledge and approval.

In the absence of fraud it may be laid down as a general rule that the fact that his will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should when coupled with his execution of the will be held conclusive evidence that he knew and approves of its contents¹. There is, however, no conclusive presumption that a testator who executes his will after having it read to him must be held to have known and approved of the contents; it is open to the tribunal before which the question arises to find as a fact that the will had not been read to him in such a way as to convey to his mind a due appreciation of its contents². However, the presumption of knowledge and approval stated above must be rebutted by the clearest evidence³.

1 *Guardhouse v Blackburn* (1866) LR 1 P & D 109 at 116 per Sir JP Wilde. This judge restated the same proposition in slightly different terms in his charge to the jury in *Atter v Atkinson* (1869) LR 1 P & D 665 at 670.

2 *Fulton v Andrew* (1875) LR 7 HL 448, commenting on *Atter v Atkinson* (1869) LR 1 P & D 665; *Garnett-Botfield v Garnett-Botfield* [1901] P 335; *Re Morris* [1971] P 62, [1970] 1 All ER 1057. See also *Re Phelan* [1972] Fam 33, [1971] 3 All ER 1256; *Beamish v Beamish* [1894] 1 IR 7.

3 *Gregson v Taylor* [1917] P 256 (misdescription of legatee included in probate).

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318. Circumstances rebutting presumption of knowledge and approval.

Whenever the circumstances under which a will is prepared raise a well-grounded suspicion that it does not express the testator's mind, the court ought not to pronounce in favour of it unless the suspicion is removed¹. Accordingly, where a person propounds a will prepared by himself or on his instructions under which he benefits, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it². A similar onus is raised where there is some weakness in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument of those around him³; or where the testator is of extreme age⁴; or where knowledge of the contents of the will is not brought home to him⁵; or where the will was prepared on verbal instructions only⁶, or was made by interrogating the testator⁷; or where there was any concealment or misrepresentation⁸; or where the will is at variance with the testator's known affections⁹, or previous declarations¹⁰, or dispositions in former wills¹¹, or there is a general sense of impropriety¹².

1 *Tyrrell v Painton* [1894] P 151 at 159, CA, per Davey LJ; *Donnelly v Broughton* [1891] AC 435, PC; *Paske v Ollat* (1815) 2 Phillim 323. As to the interpretation of separate wills see PARA 107 ante. A will need not originate from the testator: see *Constable v Tufnell* (1833) 4 Hag Ecc 465 at 485; see also *Tanner v Public Trustee* [1973] 1 NZLR 68, Wellington CA, applying *Barry v Butlin* (1838) 2 Moo PCC 480.

2 *Hagarty v King* (1880) 5 LR Ir 249 (affd 7 LR Ir 18, CA); *Dodge v Meech* (1828) 1 Hag Ecc 612; *Paske v Ollat* (1815) 2 Phillim 323; *Barry v Butlin* (1838) 2 Moo PCC 480 at 482; *Fulton v Andrew* (1875) LR 7 HL 448 at 471; *Re Liver*, *Scott v Woods* (1955) 106 Ljo 75. Cf *Tyrrell v Painton* [1894] P 151, CA; *Wintle v Nye* [1959] 1 All ER 552, [1959] 1 WLR 284, HL. The Law Society demands a high standard of solicitors who benefit under wills they have prepared: *Re a Solicitor* [1975] QB 475, [1974] 3 All ER 853. See also PARA 320 post. A similar principle applies in construing a will: see *Re Pugh's Will Trusts*, *Marten v Pugh* [1967] 3 All ER 337, [1967] 1 WLR 1262.

3 *Ingram v Wyatt* (1828) 1 Hag Ecc 384 (revsd on the facts sub nom *Wyatt v Ingram* (1831) 3 Hag Ecc 466); *Mountain v Bennet* (1787) 1 Cox Eq Cas 353; *Harwood v Baker* (1840) 3 Moo PCC 282. See also *Re Heinke*, *Westminster Bank Ltd v Massey* (1959) Times, 21 January (effect of alcohol may be such as to impair knowledge and approval of testator, but not his capacity). As to what constitutes undue influence see PARA 323 post.

4 See *Kinleside v Harrison* (1818) 2 Phillim 449; *Griffiths v Robins* (1818) 3 Madd 191 (deed).

5 *Paske v Ollat* (1815) 2 Phillim 323.

- 6 *Middleton v Forbes* (1787) cited in 1 Hag Ecc at 395, 398; *Mackenzie v Handasyde* (1829) 2 Hag Ecc 211.
- 7 *Green v Skipworth* (1809) 1 Phillim 53 at 58.
- 8 *Segrave v Kirwan* (1828) Beat 157; *Allen v M'Pherson* (1847) 1 HL Cas 191 at 207; *Paske v Ollat* (1815) 2 Phillim 323. As to fraud see PARA 326 post.
- 9 *King v Farley* (1828) 1 Hag Ecc 502; *Brydges v King* (1828) 1 Hag Ecc 256.
- 10 *Baker v Batt* (1838) 2 Moo PCC 317; *Brydges v King* (1828) 1 Hag Ecc 256.
- 11 *Marsh v Tyrrell and Harding* (1828) 2 Hag Ecc 84 (revsd by consent (1832) 3 Hag Ecc 471); *Mynn v Robinson* (1828) 2 Hag Ecc 169 at 179; *Brydges v King* (1828) 1 Hag Ecc 256; *Harwood v Baker* (1840) 3 Moo PCC 282.
- 12 *Butlin v Barry* (1837) 1 Curt 614; *Durling and Parker v Loveland* (1839) 2 Curt 225.

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318 Circumstances rebutting presumption of knowledge and approval

NOTE 1--See *Re Rowinska; Wyneczenko v Plucinska-Surowka* [2005] EWHC 2794 (Ch), (2005) 8 ITELR 385.

NOTE 2--The standard of proof imposed on the propounder of the will is an evidential burden to be discharged on the balance of probabilities: *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 2 All ER 87. See also *Re Good; Carapeto v Good* [2002] EWHC 640 (Ch), [2002] All ER (D) 141 (Apr) (testator approved and fully understood financial effects of will).

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319. Fiduciary relationship.

While the mere proof of the existence of a fiduciary relationship does not raise a presumption of undue influence of itself sufficient to vitiate a gift by will¹, the existence of a fiduciary relationship between the testator and a beneficiary raises a suspicion of impropriety and renders it necessary to prove that the testator knew and approved the contents of the will he has made²; still stricter proof is required where the will has been prepared or obtained by such a beneficiary³. The medical practitioner⁴, the spiritual adviser⁵ and especially the legal adviser⁶ are each in a fiduciary position to those who come to them for advice.

1 *Parfitt v Lawless* (1872) LR 2 P & D 462. See PARA 324 post. See also GIFTS vol 52 (2009) PARA 214; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq.

2 *Butlin v Barry* (1837) 1 Curt 614 (affd sub nom *Barry v Butlin* (1838) 2 Moo PCC 480); *Durling and Parker v Loveland* (1839) 2 Curt 225; *Atter v Atkinson* (1869) LR 1 P & D 665 at 668; *Fulton v Andrew* (1875) LR 7 HL 448 at 463; *Wintle v Nye* [1959] 1 All ER 552, [1959] 1 WLR 284, HL.

3 *Huguenin v Baseley* (1807) 14 Ves 273; *Popham v Brooke* (1828) 5 Russ 8; *Segrave v Kirwan* (1828) Beat 157; *Ingram v Wyatt* (1828) 1 Hag Ecc 384 (revsd on the facts sub nom *Wyatt v Ingram* (1831) 3 Hag Ecc 466); *Middleton v Sherburne* (1841) 4 Y & C Ex 358; *Wintle v Nye* [1959] 1 All ER 552, [1959] 1 WLR 284, HL.

4 *Popham v Brooke* (1828) 5 Russ 8; *Dent v Bennett* (1839) 4 My & Cr 269; *Greville v Tylee* (1851) 7 Moo PCC 320.

5 *Parfitt v Lawless* (1872) LR 2 P & D 462; *Middleton v Sherburne* (1841) 4 Y & C Ex 358; *Huguenin v Baseley* (1807) 14 Ves 273.

6 *Seagrave v Kirwan* (1828) Beat 157; *Ingram v Wyatt* (1828) 1 Hag Ecc 384 (revsd on the facts sub nom *Wyatt v Ingram* (1831) 3 Hag Ecc 466); *Maccabe v Hussey* (1831) 2 Dow & Cl 440, HL; *Raworth v Marriott* (1833) 1 My & K 643; *Dufaur v Croft* (1840) 3 Moo PCC 136; *Powell v Powell* [1900] 1 Ch 243; *Willis v Barron* [1902] AC 271, HL; *Wright v Carter* [1903] 1 Ch 27, CA; *Wintle v Nye* [1959] 1 All ER 552, [1959] 1 WLR 284, HL.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(iv) Want of Knowledge and Approval/320. Will prepared by a person in his own favour.

320. Will prepared by a person in his own favour.

Where a person has prepared a will in his own favour it is his duty to bring to the testator's mind the effect of his testamentary act, and failure to do so may amount to fraud¹. Those who take for their own benefit after having been instrumental in preparing or obtaining a will have thrown upon them the onus of showing the righteousness of the transaction². This means that, if no evidence is given by the party on whom the burden is cast, the issue must be found against him³, but if evidence is given on which the court can come to a determinate conclusion the onus need not be considered. On the other hand, if the evidence is so evenly balanced that no determinate conclusion can be reached, the onus becomes the determining factor of the whole case⁴. It is a circumstance that ought generally to excite suspicion and call for vigilant and jealous examination of the evidence in support of the instrument⁵. It rests upon the person who has procured a will under which he takes a large benefit to show that the will does really express the testator's mind and intention⁶. The mere circumstance that the person who prepared a will takes an interest under it does not vitiate the will, and the principles must not be used to raise a cloud of unjustifiable suspicion⁷.

An analogous principle applies in equity by which an executor who has prepared a will in his own favour may not be allowed to benefit⁸.

- 1 *Fulton v Andrew* (1875) LR 7 HL 448 at 463 per Lord Cairns LC.
- 2 *Fulton v Andrew* (1875) LR 7 HL 448 at 471 per Lord Hatherley. It was this phrase, 'righteousness of the transaction', which gave rise to a form of pleading which places on the opposing party the onus of removing any grounds of suspicion. It is a plea often used where undue influence cannot be proved, and is sometimes applicable where the person preparing the will has some close link of kinship, affection, or interest with the beneficiary: cf *Tyrrell v Painton* [1894] P 151, CA. See also PARA 318 ante.
- 3 *Barry v Butlin* (1838) 2 Moo PCC 480; *Harmes v Hinkson* [1946] WN 118, PC.
- 4 *Harmes v Hinkson* [1946] WN 118, PC; and *Stark v Dennison* [1973] 1 WWR 468, Alta CA, following *Robins v National Trust Co* [1927] AC 515 at 520, PC. See also CIVIL PROCEDURE. As to the right to begin proceedings see PARA 323 note 2 post.
- 5 *Barry v Butlin* (1838) 2 Moo PCC 480 at 482 per Parke B; *Brown v Fisher* (1890) 63 LT 465; *Tyrrell v Painton* [1894] P 151 at 157, CA, per Lindley LJ; *Re Liver, Scott v Woods* (1956) 106 L Jo 75; *Stark v Dennison* [1973] 1 WWR 368, Alta CA. As to the right of a solicitor to take a benefit under a client's will see LEGAL PROFESSIONS vol 66 (2009) PARA 810. See also PARA 318 note 2 ante.
- 6 *Brown v Fisher* (1890) 63 LT 465; *Finny v Govett* (1908) 25 TLR 186, CA.
- 7 *Low v Guthrie* [1909] AC 278 at 283, HL; *Harmes v Hinkson* [1946] WN 118, PC. Cf *Spiers v English* [1907] P 122 at 124 per Sir G Barnes.
- 8 See *Re Pugh's Will Trusts, Marten v Pugh* [1967] 3 All ER 337, [1967] 1 WLR 1262; and TRUSTS vol 48 (2007 Reissue) PARA 726.

UPDATE

269-334 Contentious Probate

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320 Will prepared by a person in his own favour

NOTE 2--The onus of dispelling suspicion is an evidential burden to be discharged on the balance of probabilities: *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 2 All ER 87.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(iv) Want of Knowledge and Approval/321. Partial exclusion.

321. Partial exclusion.

Where the testator is shown to have known and approved of a particular word or clause, it cannot be excepted from the grant, even though it produces an effect contrary to his real intention, or may have been inserted by a slip on the part of the draughtsman¹. The remedy in such cases lies with the court construing the will. The court will refuse probate of a document executed by mistake² and may omit words from the probated will where they were included by mistake³.

1 *Harter v Harter* (1873) LR 3 P & D 11; *Collins v Elstone* [1893] P 1; *Rhodes v Rhodes* (1882) 7 App Cas 192, PC; *Gregson v Taylor* [1917] P 256; *Re Beech, Beech v Public Trustee* [1923] P 46, CA. As to the limited jurisdiction to exclude words from probate in certain cases see PARAS 139, 301 ante; and as to the court's power to rectify mistakes in wills see PARAS 320-321 ante.

2 *Re Meyer* [1908] P 353. As to mistake generally see MISTAKE.

3 See PARAS 139, 301 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(iv) Want of Knowledge and Approval/322. Issue of want of knowledge and approval to be raised in probate court.

322. Issue of want of knowledge and approval to be raised in probate court.

Questions of want of knowledge or approval must be raised in the probate court¹, but where that court holds the will to be valid equity may impose a trust on the bequest. For example a legal adviser cannot benefit from his own ignorance or negligence and, if he takes a benefit under a will to the prejudice of other persons as a result, he may be held to be a trustee for those persons².

1 *Nelson v Oldfield* (1688) 2 Vern 76; *Allen v M'Pherson* (1847) 1 HL Cas 191; *Meluish v Milton* (1876) 3 ChD 27, CA. As to the construction of references to the probate court see PARA 74 ante.

2 *Segrave v Kirwan* (1828) Beat 157 at 166; *Bulkley v Wilford* (1834) 8 Bli NS 111, HL. See also PARAS 325 text and note 4, 326 note 5 post.

UPDATE

269-334 Contentious Probate

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(v) Undue Influence/323. What constitutes undue influence.

(v) Undue Influence

323. What constitutes undue influence.

A will or part of a will may be set aside as having been obtained by undue influence¹. If the execution of the will is not in dispute the party alleging undue influence has the right to begin², and must discharge the burden of proof³ by clear evidence that the influence was in fact exercised⁴. To constitute undue influence there must be coercion⁵; pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made⁶.

A person may exercise an unbounded influence over another, which may be a very bad influence, without its being undue influence in the legal sense of the word⁷. Undue influence may be found against a person who had died before the execution of the will, on the ground that the testatrix was under that person's complete control until his death, and was therefore rendered incapable of making a fresh will free from such undue influence⁸.

1 As to the allegation of undue influence in probate and the right to cross-examine with the inference of, but without alleging, undue influence see PARA 284 ante. The test of undue influence in probate is very different from the equitable presumption: see PARA 324 post.

2 *Hutley v Grimstone* (1879) 5 PD 24; *Craig v Lamoureux*[1920] AC 349, PC. See, however, *Re Parry's Estate, Parry v Fraser*[1977] 1 All ER 309, [1977] 1 WLR 93. Under CPR 28.7 (Fast Track cases) and 29.9 (Multi-Track cases) the trial judge may give directions as to the party to begin, or if he does not do so the trial will be conducted in accordance with any order previously made. The traditional probate practice is that the party propounding the last will should begin unless either the validity of the will is not in issue and the sole issue is revocation or, after formal proof, the only issues are undue influence, fraud or forgery. Formal proof may be required only by the court and may not be raised on the statements of case: see *Hutley v Grimstone* supra. As to the CPR see PARA 37 note 3 ante.

3 *Craig v Lamoureux*[1920] AC 349, PC; *Boyse v Rossborough* (1857) 6 HL Cas 2 at 49; *Parfitt v Lawless*(1872) LR 2 P & D 462.

4 *Bur Singh v Uttam Singh* (1911) LR 38 Ind App 13, PC. Where a defendant stands accused of having exercised undue influence over a testator, the court ought not to draw adverse inferences from his failure to appear at proceedings or to provide evidence: *Killick v Pountney*(1999) Times, 30 April.

5 *Wingrove v Wingrove* (1885) 11 PD 81 at 82 per Sir J Hannen P ('it is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence'). See also *Williams v Goude* (1828) 1 Hag Ecc 577 at 581 per Sir J Nicholl ('the influence to vitiate an act must amount to force and coercion destroying free agency').

6 *Hall v Hall*(1868) LR 1 P & D 481 at 482 per Sir JP Wilde. See also *Mountain v Bennet* (1787) 1 Cox Eq Cas 353; *Boyse v Rossborough* (1857) 6 HL Cas 2 (actual violence need not be proved, but it must be an influence relating to the making of the will itself and overbearing the mind of the testator); *Baudains v Richardson*[1906] AC 169, PC. 'If there is evidence showing the exertion of improper influence in relation to the execution of a will, it will be easier, and sometimes much easier, where the testator is enfeebled in body or mind, and all the more so if he is enfeebled in both body and mind, to find that such influence was in all the circumstances undue': *Killick v Pountney* as reported in (1999) Lexis, Enggen Library, Cases File per James Munby QC.

7 In *Wingrove v Wingrove* (1885) 11 PD 81 at 82 Sir J Hannen excluded from the category of undue influence, by way of example, the cases of a young man who succumbs to the fascinations of a woman sufficiently to make a will in her favour, and leaving his relations nothing, and of a man who leaves his property to a man who has encouraged him in evil courses.

8 *Radford v Risdon* (1912) 28 TLR 342, where evidence was allowed of statements by the deceased person not in the presence of the testatrix.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

323 What constitutes undue influence

NOTES 5, 7--See *Re Good; Carapeto v Good*[2002] EWHC 640 (Ch), [2002] All ER (D) 141 (Apr) (mere persuasion to make generous provision in will did not constitute undue influence).

NOTE 5--See *Kite v Rasini* [2009] WTLR 969.

NOTE 6--See also *Cattermole v Prisk*[2006] 1 FLR 693.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(v) Undue Influence/324. Distinction between undue influence and want of knowledge and approval.

324. Distinction between undue influence and want of knowledge and approval.

A man may approve and know the contents of a will when his volition has been overpowered, and conversely he may of his own free volition execute a document which for some reason he has not approved or which contains matter of which he has no knowledge. These are separate issues which must be made the subject of separate allegations, although they are often simultaneously alleged in a statement of case¹. The mere proof of the existence of the relation of parent and child, husband and wife, doctor and patient, solicitor and client, confessor and penitent, guardian and ward or tutor and pupil does not raise a presumption of undue influence sufficient to vitiate a gift by will²; but a fiduciary relationship may affect the burden of proof on the issue of knowledge and approval³.

1 See PARA 284 ante; and as to the relationship between the defences see PARA 300 ante.

2 *Parfitt v Lawless* (1872) LR 2 P & D 462; *Boyse v Rossborough* (1857) 6 HL Cas 2 at 49 per Lord Cranworth LC. As to the relationships which raise a presumption of undue influence see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq.

3 See PARA 319 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(vi) Fraud/325. Clauses fraudulently introduced excepted from grant.

(vi) Fraud

325. Clauses fraudulently introduced excepted from grant.

It may be alleged as a defence in a probate claim that the execution of the alleged will was obtained by fraud¹. Where a clause can be shown to have been introduced into a will by means of fraud practised upon the testator², or by forgery after his death³, it is excepted from the grant. In such a case the court has jurisdiction to declare the executors to be trustees for the person deprived of benefit by the fraud⁴.

1 See *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A para 9.3(c); and PARA 284 ante. As to the consequence of fraud as affecting the volition see PARA 324 ante. As to the contents of statements of case see PARA 284 ante. As to the right to begin proceedings see PARA 323 note 2 ante.

2 *Guardhouse v Blackburn* (1866) LR 1 P & D 109 (see the fourth rule laid down at 116 per Sir JP Wilde).

3 *Plume v Beale* (1717) 1 P Wms 388. See also PARA 67 ante; and EQUITY vol 16(2) (Reissue) PARA 413.

4 *Betts v Doughty* (1879) 5 PD 26. This case was settled, but the principle set out in the text emerged from it. As to evidence in charge of forgery see *Gallagher v Kennedy* [1931] NI 207.

UPDATE

269-334 Contentious Probate

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(4) GROUNDS FOR OPPOSING PROBATE/(vi) Fraud/326. Gift obtained by fraud.

326. Gift obtained by fraud.

Where a legacy is given to a person under a particular character which he has falsely assumed for the purpose of obtaining the bounty¹, and which alone is shown or is inferred to have deceived the testator² and to have been the motive of the bounty, the law on the ground of fraud does not permit the donee to avail himself of the legacy³; but a false reason given for the legacy is not of itself sufficient to destroy it⁴. In these cases the question must be raised in the probate court⁵.

1 Such a fraudulent purpose must be alleged in the statement of case and established to defeat the legacy: *Re Posner, Posner v Miller* [1953] P 277, [1953] 1 All ER 1123. See also *M'Kenna v Everitt* (1838) 1 Beav

134; *Giles v Giles, Penfold v Penfold* (1836) 1 Keen 685; *Rishton v Cobb* (1839) 5 My & Cr 145; *Re Pitts* (1859) 29 LJ Ch 168; *Turner v Brittain* (1863) 3 New Rep 21; *Re Boddington, Boddington v Clariat* (1883) 22 ChD 597.

2 *Re Posner, Posner v Miller* [1953] P 277 at 280, [1953] 1 All ER 1123 at 1125.

3 *Kennell v Abbott* (1799) 4 Ves 802 at 809 (explained in *Pratt v Mathew* (1856) 22 Beav 328 at 336; *Re Boddington, Boddington v Clariat* (1883) 22 ChD 597 at 602); *Wilkinson v Joughin* (1866) LR 2 Eq 319.

4 *Kennell v Abbott* (1799) 4 Ves 802 at 808.

5 *Meluish v Milton* (1876) 3 ChD 27, CA, following *Allen v M'Pherson* (1847) 1 HL Cas 191. As to cases where the gift has been obtained on a secret understanding between the testator and the donee see eg *Moss v Cooper* (1861) 1 John & H 352; and see TRUSTS vol 48 (2007 Reissue) PARA 673 et seq; WILLS vol 50 (2005 Reissue) PARA 509 et seq. As to the construction of references to the probate court see PARA 74 ante.

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269-334 Contentious Probate

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Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/327. Costs generally.

(5) COSTS OF PROBATE PROCEEDINGS

327. Costs generally.

The costs of probate proceedings are in the discretion of the court¹, and if the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party². This is subject to the court's power to make a different order³, and the exception for probate proceedings in the Court of Appeal⁴.

In deciding what order, if any, to make about costs the court must have regard to all the circumstances, including the conduct of all the parties⁵, whether a party has succeeded on part of his case, even if he has not been wholly successful, and any admissible offer to settle⁶.

Costs should be asked for at the trial⁷, and the bill served at the commencement of detailed assessment must include at one and the same time all the costs to which the order entitles the litigant⁸.

1 See the Supreme Court Act 1981 s 51 (as substituted and amended) (see CIVIL PROCEDURE;COURTS); and CPR 44.3(1) (which provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid). For the different orders as to the amount of costs which may be made see CPR 44.3(6). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 44.3(2)(a); *Page v Williamson* (1902) 87 LT 146. See also *Twist v Tye* [1902] P 92 at 93; *Spiers v English* [1907] P 122 at 123, the principal authority on this point, approved in *Re Cutcliffe's Estate, Le Duc v Veness* [1959] P 6, [1958] 3 All ER 642, CA. It has been said that it is hardly in the nature of a discretion that its exercise should be adjusted by exact rule; no positive regulation could be established that would bear the strain put upon it by the justice or hardship of particular instances, but by acknowledged method and general classification the suitor may in some measure be enabled to estimate the prospect before him: *Mitchell and*

Mitchell v Gard and Kingwell (1863) 3 Sw & Tr 275 at 277 per Sir JP Wilde, followed in *Re Cutcliffe's Estate, Le Duc v Veness* supra at 15 and 643.

3 See CPR 44.3(2)(b). In addition the court has a general discretion as to whether costs are payable by one party to another before the general rule becomes applicable: see CPR 44.3(1)(a).

4 The general rule does not apply to proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings: CPR 44.3(3)(b).

5 The conduct of the parties includes: (1) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol (see PARA 269 note 6 ante); (2) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (3) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (4) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim: CPR 44.3(5).

6 See CPR 44.3(4). As to the overriding objective see PARA 37 note 3 ante. The CPR and Practice Directions provide one specific exception to the general rule which relates to probate claims, ie where the defence is confined to requiring the will to be proved in solemn form and cross-examining the witnesses to the will (see PARA 283 ante): see *Practice Direction about Costs--Directions Relating to CPR Pt 44* (2000) PD 44 para 2.2. Before the CPR came into force on 26 April 1999 there were established principles which the court followed with respect to the costs of probate proceedings by which in certain circumstances the unsuccessful party was not ordered to pay the costs of the successful party: see PARAS 328-330 post. The CPR neither exclude nor expressly indorse these principles, but since the tendency of the CPR costs rules is to increase rather than decrease the exceptions to the general rule, and the former principles are not inconsistent with the CPR, it is likely that the former principles will continue to be followed. See, however, PARA 37 note 3 ante.

7 *Re Elmsley, Dyke v Williams* (1871) LR 2 P & D 239; cf *Bewsher v Williams and Ball* (1861) 3 Sw & Tr 62 (costs refused at trial but allowed on motion subsequently).

8 *Re Segalov, Hyman and Teff v Segalov* [1952] P 241, [1952] 2 All ER 107.

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269-334 Contentious Probate

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327 Costs generally

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/328. Costs of successful parties.

328. Costs of successful parties.

As a general rule, an executor who proves a will in solemn form, whether he has done so of his own motion or has been put to proof, is entitled to have his costs¹ as between solicitor and client out of the estate without a court order². A beneficiary who successfully propounds a will in solemn form is entitled to an order for his costs and expenses out of the estate³. A person entitled under an intestacy⁴ or to a grant of probate under a prior will who successfully contests

the validity of a later will is also entitled to an order for his costs out of the estate, so far as an unsuccessful party who is ordered to pay his costs fails to pay them. If, however, the successful party is not entitled to a grant as a personal representative of the deceased, and the order for costs is confined to being an order against another party, then it seems that the successful party can only recover his costs (if at all) from the other party⁵. Where there is sufficient divergence of interest between defendants, they are justified in appearing by separate counsel⁶.

1 *Re Price, Williams v Jenkins* (1886) 31 ChD 485; *Graham v M'Cashin* [1901] 1 IR 404, CA.

2 *Re Plant, Wild v Plant* [1926] P 139, CA; *Headington v Holloway* (1830) 3 Hag Ecc 280 at 282; *Re Fuld, Hartley v Fuld (No 3)* [1968] P 675 at 720, [1965] 3 All ER 776 at 783 per Scarman J. For exceptions to the rule see PARA 329 post. Cf CPR 48.4, which provides that where a trustee or personal representative is entitled to costs out of the trust fund or estate he is entitled to them on the indemnity basis unless he has acted other than for the benefit of the fund. See also PARA 327 note 6 ante. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

3 *Sutton v Drax* (1815) 2 Phillim 323; *Wilkinson v Corfield* (1881) 6 PD 27. The unsuccessful party is not always ordered to pay the successful party's costs: see PARA 330 post.

4 *Critchell v Critchell* (1863) 3 Sw & Tr 41; *Bewsher v Williams and Ball* (1861) 3 Sw & Tr 62.

5 *Nash v Yelloly* (1862) 3 Sw & Tr 59; but cf *Cross v Cross* (1864) 3 Sw & Tr 292. Failure of the successful party to obtain his costs out of the estate could prevent any claim being brought to recover the costs (so far as not recovered from the unsuccessful party) as damages for professional negligence against the solicitor who prepared the will which has been pronounced against, since such a claim is the estate's rather than a beneficiary's: see *Worby v Rosser* (1999) Times, 9 June, CA. In *Re Fuld, Hartley v Fuld (No 3)* [1968] P 675, [1965] 3 All ER 776 the costs of the successful parties were ordered to be paid out of the estate and the unsuccessful party was ordered to contribute to the costs borne by the estate.

6 *Bagshaw v Pimm* [1900] P 148, CA.

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328 Costs of successful parties

NOTE 2--Now, the general rule is that the trustee or personal representative is entitled to be paid the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the relevant trust fund or estate; and where he is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis: CPR 48.4(2), (3) (substituted by SI 2001/4015).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/329. When executor is liable for costs.

329. When executor is liable for costs.

Although, as already stated, an executor, whether as claimant or defendant, is *prima facie* justified in propounding a will and generally entitled to his costs out of the estate, he may be refused his costs or condemned in the costs if it is proved that he must have known that he was propounding a document which could not be supported¹. He is not obliged to propound a will², and may by unreasonable conduct not only disentitle himself to costs but render himself liable to pay the costs of the successful parties³, especially if he himself takes a large benefit under the will which he seeks to propound⁴.

If one of two executors is held to have exercised undue influence, and the other to have been free from blame, costs may be ordered against both⁵.

1 *Boughton v Knight* (1873) LR 3 P & D 64; *Rogers v Le Cocq* (1896) 65 LJP 68; *Page v Williamson* (1902) 87 LT 146. See also PARA 270 ante.

2 *Rennie v Massie* (1866) LR 1 P & D 118 at 119.

3 The practice was fully discussed in *Re Plant, Wild v Plant* [1926] P 139, CA, where it was held that when an executor propounded a will and codicil, and the will was admitted to probate and the codicil pronounced against, he was entitled to costs out of the estate unless he had acted unreasonably. See also PARA 328 text and note 2 ante.

4 *Re Speke, Speke v Deakin* (1913) 109 LT 719; *Re Osment, Child and Jarvis v Osment* [1914] P 129 (costs of all parties ordered to come out of legacies bequeathed to the executor, whose conduct had been the cause of the litigation); *Thomas v Jones* [1928] P 162 (solicitor, personally interested, disregarded client's testamentary capacity and was ordered to pay part of increased costs); *Re Austin* (1929) 73 Sol Jo 545 (solicitor's benefit under will he prepared). An executor has a right to costs out of the estate unless, as said of a trustee by Sir G Jessel MR in *Turner v Hancock* (1882) 20 ChD 303 at 305, CA, it is 'lost or curtailed by such inequitable conduct ... as may amount to a violation or culpable neglect of his duty'; cited in *Thomas v Jones* supra at 165 per Lord Merrivale P. For earlier cases see *Saph v Atkinson and Westcott* (1822) 1 Add 162; *Dodge v Meech* (1828) 1 Hag Ecc 612; *Marsh v Tyrrell and Harding* (1828) 2 Hag Ecc 84 (on appeal (1832) 3 Hag Ecc 471); *Baker v Batt* (1838) 2 Moo PCC 317; *Burls v Burls* (1868) LR 1 P & D 472 (will lost or destroyed through executor's negligence).

5 *Re Barlow, Haydon v Pring* [1919] P 131, CA; *Re Jeffries, Hill v Jeffries* (1916) 33 TLR 80, CA. See also *Kelly v O'Connor* [1917] 1 IR 312 (donatio mortis causa held not to be assets for payment of costs); *Selwood v Selwood* (1920) 125 LT 26 (unsuccessful attempt to obtain probate of soldier's letter).

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/330. Unsuccessful parties.

330. Unsuccessful parties.

Subject to the overriding consideration that costs are a matter of discretion¹, two general principles have been laid down as to unsuccessful parties²: (1) where the cause of litigation takes its origin in the fault of the testator³ or of those interested in the residuary estate⁴, the

costs of the unsuccessful party are allowed out of the estate; and (2) the unsuccessful party will not be ordered to pay costs if there is a sufficient and reasonable ground, looking to his knowledge and means of knowledge, to question the execution of the will or the testator's capacity, or his knowledge and approval of the will⁵. A party unsuccessfully seeking to revoke a grant must pay the costs, unless he has reasonable grounds for raising the question⁶. The probability is that if a party unsuccessfully makes charges of undue influence and fraud he will be condemned in the costs not only of those charges but of the whole action⁷.

1 See PARA 327 ante.

2 *Mitchell and Mitchell v Gard and Kingwell* (1863) 3 Sw & Tr 275 at 278 per Sir JP Wilde; *Re Cutcliffe's Estate, Le Duc v Veness* [1959] P 6, [1958] 3 All ER 642, CA.

3 Eg where the testator left his testamentary papers in a confused or disorderly state: *Mitchell and Mitchell v Gard and Kingwell* (1863) 3 Sw & Tr 275; *Lemage v Goodban* (1865) LR 1 P & D 57 at 63; *Davies v Gregory* (1873) LR 3 P & D 28; *Jenner v Finch* (1879) 5 PD 106; *Re Hall-Dare, Le Marchant v Lee Warner* [1916] 1 Ch 272.

4 See *Smith v Smith* (1865) 4 Sw & Tr 3; *Orton v Smith* (1873) LR 3 P & D 23. See also *Re Birkby* (1929) 73 Sol Jo 556 (lost will).

5 See eg *Ferrey v King* (1861) 3 Sw & Tr 51; *Bramley v Bramley* (1864) 3 Sw & Tr 430; *Tippett v Tippett* (1865) LR 1 P & D 54; *Aylwin v Aylwin* [1902] P 203; *Tyrrell v Panton* [1894] P 151, CA. As to limitation of costs by notice in a defence that the defendant whose defence it is will raise no positive case but insist on the will being proved in solemn form, and cross-examine only, see PARA 283 ante. See also *Re Fanshawe, Harari v Rollo* (1983) Times, 17 November, CA (allegations of want of knowledge and approval rejected by the judge after an 11 day trial; held a proper exercise of the judge's discretion to make no order for costs where he held it was reasonable to insist on proof of the will in solemn form but the unsuccessful party had conducted the case as straight hostile litigation).

6 *Spiers v English* [1907] P 122, commenting on *Wilson v Bassil* [1903] P 239; *Levy v Leo* (1909) 25 TLR 717; *Oldcorn v Tenniswood* (1909) 25 TLR 825; *Re Cutcliffe's Estate, Le Duc v Veness* [1959] P 6, [1958] 3 All ER 642, CA.

7 *Re Cutcliffe's Estate, Le Duc v Veness* [1959] P 6 at 21, [1959] 3 All ER 642 at 648-649, CA, per Hodson LJ. See also, however, *Larke v Nugus* (1979) 123 Sol Jo 337, CA (allegations of undue influence and want of knowledge and approval withdrawn by the defendants; the trial judge took the view that the costs of the former should be paid out of the estate and of the latter by the defendants, but that the allegations were based on similar facts, and so made no order for costs). As to the factors relevant to alleging in a statement of case want of knowledge and approval alone or together with undue influence or fraud see PARA 284 ante

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

330 Unsuccessful parties

NOTE 5--See *Kostic v Chaplin* [2007] EWHC 2909 (Ch), [2008] WTLR 655, [2007] All ER (D) 119 (Dec) (costs of investigating testator's testamentary capacity, following interested party's challenge of will, paid out of estate); *Re Ritchie; Ritchie v Joslin* [2009] EWHC B7 (Ch), [2009] WTLR 885, [2009] All ER (D) 78 (Apr) (successful challenge to testamentary capacity).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/331. Default of defence.

331. Default of defence.

The challenge raised by a defaulting defendant can in general necessitate a full trial despite the failure to acknowledge service or serve a defence¹, because the claimant may need to obtain declarations or other relief not obtainable under a default judgment². In such cases it has been held that the claimant is entitled to his costs³, and the same principle would seem to apply where a claimant is driven to a probate trial by a defaulting defendant, that he should obtain his costs against such a defendant.

¹ As to default of acknowledgment of service see PARA 278 ante; and as to default of statements of case see PARA 285 ante.

² I.e. under CPR Pt 12. This procedure is not available in probate proceedings: see *Practice Direction--Contentious Probate Proceedings* (1999) PD 49A paras 6.1, 10.1; and PARAS 278, 285 ante. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE. As to the principles governing declarations by the court see *Wallersteiner v Moir* [1974] 3 All ER 217 at 251, [1974] 1 WLR 991 at 1028-1029, CA, per Buckley LJ.

³ *Grant v Knaresborough UDC* [1928] Ch 310. As to limitation of costs by notice to cross-examine only see PARA 283 ante.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/332. Costs allowable on assessment.

332. Costs allowable on assessment.

It has been held that where an unsuccessful party has been ordered to pay costs, he must bear the additional costs¹ thrown on the estate by the appointment of an administrator pending suit, but it has also been held that this will not include the cost of the work done by the administrator which would have been necessary in any event, and that there must be an apportionment². The allowance on detailed assessment of costs resulting from the retention of leading counsel is a matter for the court's discretion, but it has been held that where a compromise had been agreed through leading counsel on both sides it was inconsistent with the agreement to object to the allowance of such costs on taxation³.

¹ *Fisher v Fisher* (1878) 4 PD 231; see also that case as reported in 48 LJP 69.

2 *Re Howlett, Howlett v Howlett* [1950] P 177, [1950] 1 All ER 485. As to administration pending suit see PARA 216 et seq ante. As to limitation of costs by notice to cross-examine only see PARA 283 ante.

3 *Re Bond, Osborne v Cresswell* [1952] WN 534, CA.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/333. Payment of costs out of certain portions of the estate.

333. Payment of costs out of certain portions of the estate.

Where an order is made in a probate claim that costs are to be paid out of the estate, the judge making the order may direct out of what portion of the estate they are to be paid¹. Where they are directed generally to be paid out of the estate they are payable out of the entirety of the estate in due order of administration². Where the order in probate proceedings for payment of costs is not made until after an order has been made for the administration of the estate, the order in the probate proceedings can only operate upon what remains after payment of the costs of administration³.

1 *Dean v Bulmer* [1905] P 1; *Harrington v Butt* [1905] P 3n; *Re Osment, Child and Jarvis v Osment* [1914] P 129 (see PARA 329 note 4 ante).

2 *Re Vickerstaff, Vickerstaff v Chadwick* [1906] 1 Ch 762; and see *Brisco v Baillie and Hamilton* [1902] P 234 at 238. The ground upon which *Re Shaw, Bridges v Shaw* [1894] 3 Ch 615 was based has disappeared.

3 *Re Mayhew, Rowles v Mayhew* (1877) 5 ChD 596, CA; *Major v Major* (1854) 2 Drew 281.

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/3. CONTENTIOUS PROBATE/(5) COSTS OF PROBATE PROCEEDINGS/334. Security for costs.

334. Security for costs.

Security for costs may be obtained on the conditions laid down in the Civil Procedure Rules¹. The main ground is that the claimant or party instituting proceedings is resident abroad². A caveator is not held to have instituted the proceedings and cannot be ordered to give security³. The substance of the matter has to be considered both as to the substantive proceedings and the role (offensive or defensive) of the parties in the proceedings in question⁴.

1 See CPR Sch 1 RSC Ord 23, which applies to both the High Court and the county court (see CPR Sch 1 RSC Ord 23 r A1). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 CPR Sch 1 RSC Ord 23 r 1(1)(a); *Re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co* (1876) 2 ChD 531. Security for costs should not be ordered against an individual claimant who is a national of and resident in another European Union state: *Fitzgerald v Williams* [1996] QB 657, [1996] 2 All ER 171, CA.

3 *Re Emery, Emery v Emery* [1923] P 184 (in which the only parties were the executor as plaintiff and the caveator as defendant); *Rose v Epstein* [1974] 2 All ER 1065, [1974] 1 WLR 1565 (affd [1974] 3 All ER 745, [1974] 1 WLR 1565 at 1572, CA). As to caveators see PARA 86 et seq ante.

4 *Visco v Minter* [1969] P 82 at 87, [1969] 2 All ER 714 at 717 per Ormrod J; and see 91 LQR 4. This was not a probate case and was not cited in the judgments in *Rose v Epstein* [1974] 2 All ER 1065, [1974] 1 WLR 1565 (affd [1974] 3 All ER 745, [1974] 1 WLR 1565 at 1572, CA).

UPDATE

269-334 Contentious Probate

Practice Direction--Contentious Probate Proceedings (1999) PD 49A revoked. For the procedure relating to probate claims generally see now CPR 57.1-57.11 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); *Practice Direction--Probate* PD 57; and individual paras.

334 Security for costs

TEXT AND NOTES--CPR Sch 1 RSC Ord 23 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(1) PROPERTY WHICH DEVOLVES/335. Devolution of property upon death.

4. DEVOLUTION ON THE REPRESENTATIVE

(1) PROPERTY WHICH DEVOLVES

335. Devolution of property upon death.

All property¹, whether personal or real², to which a deceased person was entitled for an interest not ceasing on his death³ now devolves upon his personal representative⁴. 'Real estate' is a term of art, a technical term well understood⁵. Except in so far as is expressly provided by statute, it does not include leasehold interests or other chattels real⁶. For the purpose, however, of the statutory provisions which relate to the devolution of real estate in the case of death

occurring after 1925⁷, 'real estate' includes chattels real as well as land in possession, remainder or reversion⁸. It comprises all interests in land⁹, whether corporeal or incorporeal¹⁰ and includes manors¹¹ and advowsons¹². The devolution of real estate is considered in detail elsewhere in this title¹³.

'Personal estate'¹⁴ includes money, share of government and other funds, securities for money (not being real estate), debts¹⁵, choses in action¹⁶, rights, credits, goods¹⁷ and all other property (not being real estate) which by law devolves upon the executor or administrator, and any share or interest in such property¹⁸.

Personal property which does not pass to the personal representative of a deceased person includes personal property passing by the exercise by the deceased's will of a general power of appointment¹⁹, an interest in a joint tenancy where another joint tenant survives²⁰ and the interest of a corporator sole in corporation property²¹.

1 For the meaning of 'property' see PARAS 4 note 3 ante, 347 note 5 post. Certain rights of the deceased are not regarded as property but as a dignity, eg a title or the right to bear arms: see *Manchester Corp'n v Manchester Palace of Varieties Ltd*[1955] P 133, [1955] 1 All ER 387.

2 Real property in England and Wales devolves upon a personal representative under the Administration of Estates Act 1925 ss 1-3 (ss 2, 3 as amended): see PARA 363 post. Personal property vests in the personal representative at common law. Chattels real so vest at common law and are also included within the operation of ss 1-3 (as amended): see PARAS 360, 363 post. Except as otherwise expressly provided, the Administration of Estates Act 1925 does not apply in any case where the death occurred before 1 January 1926: see s 54. As to the devolution of real estate before 1926 see PARA 363 post.

In general the devolution of immovable property is governed by the law of the place where it is situated, and succession to movable property is governed by the law of the deceased's domicile: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 380 et seq.

3 The interest of a deceased joint tenant if another joint tenant survives him and the interest of a corporation sole in the corporate property are interests which cease on death: see PARAS 361, 366 post.

4 As to vesting of an intestate's estate in the President of the Family Division until grant see PARA 34 ante.

5 *Butler v Butler*(1884) 28 ChD 66 at 71 per Chitty J.

6 Leaseholds apart from statute are personal estate because it was formerly considered that a lease was merely a contract for the enjoyment of the land demised. If the tenant was wrongly dispossessed he had no right of action at law to recover the land itself, but could only bring an action against the lessor for damages for breach of the covenant for quiet enjoyment (3 Bl Com (14th Edn) 157-158): see PERSONAL PROPERTY vol 35 (Reissue) PARA 1203; REAL PROPERTY vol 39(2) (Reissue) PARAS 1-2.

7 In the Administration of Estates Act 1925 Pt I (ss 1-3) (as amended).

8 See *ibid* s 3(1)(i); and PARA 364 post. For the meaning of 'real estate' for the purposes of the Administration of Estates Act 1925 generally see PARA 3 note 1 ante.

9 For the meaning of 'land' see PARA 364 note 1 post. See eg the Wills Act 1837 s 1 (as amended) (which defines 'real estate' for the purposes of that Act (see WILLS vol 50 (2005 Reissue) PARA 573)); and cf the definition of 'land' in the Settled Land Act 1925 s 117(1)(ix) (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 680). See also REAL PROPERTY. The distinction between real estate and personalty has become immaterial in most cases for the purposes of the distribution of estates of intestates who die after 31 December 1925 since real and personal property are now constituted into one blended fund and distributed together: see PARA 555 post.

10 As to the distinction between corporeal and incorporeal hereditaments see REAL PROPERTY vol 39(2) (Reissue) PARA 74.

11 As to the nature of manors see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 695.

12 As to advowsons see ECCLESIASTICAL LAW.

13 See PARA 363 et seq post. As to partnership property see PARA 338 post. As to property the subject of a general power of appointment see PARAS 366, 372-373, 387 post. As to chattels real see PARAS 360, 363 post. As to trust and mortgage property see PARA 368 et seq post. As to settled land see PARA 591 post.

14 For the meaning of 'personal chattels' for the purposes of the Administration of Estates Act 1925 see PARA 591 note 10 post.

15 ie including debts created by statute, as for instance the right to recover overpayment of rent under rent restrictions legislation: *Dean v Wiesengrund*[1955] 2 QB 120, [1955] 2 All ER 432, CA; *Rickless v United Artists Corp*[1988] QB 40, [1987] 1 All ER 679, CA.

16 As to the devolution of choses in action see PARA 353 et seq post.

17 As to the devolution of chattels see PARA 347 et seq post.

18 See eg the Wills Act 1837 s 1 (as amended) (which defines 'personal estate' for the purposes of that Act (see WILLS vol 50 (2005 Reissue) PARA 573). See also PERSONAL PROPERTY vol 35 (Reissue) PARA 1204. As to leasehold estates see note 6 supra. In some cases objects of property may be either real or personal, according to the surrounding circumstances: see PARA 347 post.

19 *O'Grady v Wilmot*[1916] 2 AC 231, HL. The rule is different in the case of real estate (including chattels real): see PARA 372 post. Personal estate disposed of in pursuance of a general power of appointment is assets for the payment of debts and the personal representatives are the persons entitled to receive it: see PARAS 372-373, 387 post.

20 See the Administration of Estates Act 1925 s 3(4), considered in relation to real estate in PARA 366 post. See also *Southcote v Hoare* (1810) 3 Taunt 87. As to the right of survivorship in the case of a joint tenancy of personalty see PERSONAL PROPERTY vol 35 (Reissue) PARA 1244. As to partnership property see PARA 338 post.

21 See the Administration of Estates Act 1925 s 3(5), considered in relation to real estate in PARA 366 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(1) PROPERTY WHICH DEVOLVES/336. Constructive conversion.

336. Constructive conversion.

Except in the case of a trust created by the will of a testator dying before 1 January 1997, where land is held by trustees subject to a trust for sale, land is no longer regarded as personal property¹. In the case of wills of testators dying before 1 January 1997 the equitable doctrine of conversion continues to apply under which real estate may be treated as converted into personalty, or personalty into real estate, and may devolve beneficially as so converted². Real estate may continue to be treated as converted³ where at the deceased's death there existed a contract for the sale of the real estate⁴, where the court has ordered a sale⁵, or where there is a contract giving an option of purchase and the option is not exercised until after the death of the person granting the option⁶.

1 See the Trusts of Land and Appointment of Trustees Act 1996 s 3; and REAL PROPERTY vol 39(2) (Reissue) PARA 77. The doctrine of conversion has been abolished with effect from 1 January 1997: see s 3; and REAL PROPERTY vol 39(2) (Reissue) PARA 77.

2 As to the equitable doctrine of conversion see EQUITY vol 16(2) (Reissue) PARA 701 et seq. As to its effect on the devolution of the beneficial interest under a will or on an intestacy see EQUITY vol 16(2) (Reissue) PARAS 706, 712. As to the ademption of a demise by the notional conversion of the subject matter see EQUITY vol 16(2) (Reissue) PARA 706. As to notional reconversion on the failure of the purpose of conversion see EQUITY vol 16(2) (Reissue) PARA 710.

3 See Pettit 'Demise of Trusts for Sale and the Doctrine of Conversion?' [1997] 113 LQR 207-211.

4 See EQUITY vol 16(2) (Reissue) PARA 713.

5 See EQUITY vol 16(2) (Reissue) PARA 715. See also *Steed v Preece* (1874) LR 18 Eq 192.

6 See EQUITY vol 16(2) (Reissue) PARA 714.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(1) PROPERTY WHICH DEVOLVES/337. Meaning of 'devolution'.

337. Meaning of 'devolution'.

'Devolution' is the passing of property from a person dying to a person living¹, and in this title the word is confined to the passing of property from a deceased person to his personal representative.

¹ *Parr v Parr* (1833) 1 My & K 647 at 648 per Leech MR; *Earl of Zetland v Lord Advocate* (1878) 3 App Cas 505 at 520, HL, per Lord Selborne.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(1) PROPERTY WHICH DEVOLVES/338. Partnership property.

338. Partnership property.

Subject to the terms of the partnership agreement, the personal representatives of a partner who has died are entitled in equity¹ to the deceased's interest in the partnership property². This interest devolves as personalty³. Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the death of any partner⁴. Mutual covenants by partners that they and their respective executors and administrators are to continue partners cannot be specifically enforced against the representatives of a deceased partner, and if they refuse to continue the partnership it will be dissolved as from the death of their testator, but his estate may be liable for damages in respect of the breach of contract⁵.

In the absence of any agreement between the partners, the representatives of a deceased partner are entitled to have the partnership business wound up and disposed of, and may apply to the court to enforce this right⁶.

¹ The legal estate in land passes by survivorship at law (see the Law of Property Act 1925 ss 34, 36, 39(4), Sch 1 Pt IV (all as amended); and PARA 366 post) to the surviving partners who hold it on trust for the benefit of the persons entitled in equity (see *Green v Whitehead* [1930] 1 Ch 38, CA; *Re Fuller's Contract* [1933] Ch 652; Partnership Act 1890 s 20(2)). See PARTNERSHIP vol 79 (2008) PARA 119.

² See the Partnership Act 1890 s 20(1); and PARTNERSHIP vol 79 (2008) PARA 119. The rule that a partner has no right to take the interest of a deceased partner by survivorship is of long standing: see Co Litt 182a; *Jeffereys v Small* (1683) 1 Vern 217. Formerly the right of survivorship was excluded both at law and in equity (*R v Collector of Customs, Liverpool* (1813) 2 M & S 223), but as to the passing of the legal estate in land by survivorship since 1926 see note 1 supra.

³ *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427 at 432, CA, per Romer LJ. Land held subject to a trust for sale is not to be regarded as personal property (see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and REAL PROPERTY vol 39(2) (Reissue) PARA 77); but there is for this purpose no distinction at common law and in equity between real and personal estate of the partnership: *Waterer v Waterer* (1873) LR 15 Eq 402; Pettit

'Demise of Trusts for Sale and the Doctrine of Conversion?' [1997] 113 LQR 207-211; cf *A-G v Hubbuck* (1884) 13 QBD 275, CA. See PARTNERSHIP vol 79 (2008) PARAS 116-117. As to the liability of the estate of a deceased partner for partnership debts see PARA 780 post.

4 See the Partnership Act 1890 s 33(1); and PARTNERSHIP vol 79 (2008) PARA 176. The estate of the deceased partner is not liable for debts contracted after the date of death: s 36(3). Death of a limited partner does not operate as a dissolution of a limited partnership: see the Limited Partnerships Act 1907 s 6(2); and PARTNERSHIP vol 79 (2008) PARA 227.

5 *Downs v Collins* (1848) 6 Hare 418.

6 See the Partnership Act 1890 s 39; and PARTNERSHIP vol 79 (2008) PARA 206. As to the rights of the representative where the partnership business is carried on without settling accounts, and the accountability of partners for private profits see PARA 454 post, and PARTNERSHIP vol 79 (2008) PARAS 206-209.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(1) PROPERTY WHICH DEVOLVES/339. Representatives' lien upon surplus partnership assets.

339. Representatives' lien upon surplus partnership assets.

Unless there is something in the partnership articles to the contrary, the surviving partner has not only the right but also the duty to realise the partnership property, and for the purposes of that realisation to carry on the business if it is necessary to do so¹. The representatives of a deceased partner have a general lien upon the surplus assets of the partnership in respect of their deceased partner's interest in the partnership, but they have no lien on any specific asset, whether personalty or realty, such as would fetter its realisation or conversion into money by the surviving partner².

Subject to any agreement between the partners, the amount due from the surviving partners to the representatives of a deceased partner in respect of the deceased partner's share is a debt accruing at the date of death³.

1 *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA.

2 *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427 at 432, CA, per Romer LJ, and at 434 per Fletcher Moulton LJ. See also *Re Langmead's Trusts* (1855) 20 Beav 20 (affd on appeal 7 De GM & G 353); *Payne v Hornby* (1858) 25 Beav 280; and PARTNERSHIP vol 79 (2008) PARAS 142-143. As to the devolution of goodwill see PARTNERSHIP vol 79 (2008) PARAS 213-217. As to lien generally see LIEN.

3 See the Partnership Act 1890 s 43; and PARTNERSHIP vol 79 (2008) PARA 212. Rules which, subject to any agreement, are to be observed in settling accounts between partners after a dissolution are contained in s 44: see PARTNERSHIP vol 79 (2008) PARA 212. As to proof in the bankruptcy of surviving partners see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(1) PROPERTY WHICH DEVOLVES/340. Gifts mortis causa.

340. Gifts mortis causa.

A donatio mortis causa is a gift inter vivos by which the donee is to have the absolute title to the subject of the gift, not at once, but if the donor dies¹. The donee's title becomes absolute at the moment of the donor's death so that the property given never vests in the donor's personal representative², who is obliged if necessary to lend his name or give his indorsement to assist the donee in completing his title³.

1 *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889 at 892 per Buckley J. If the donor recovers, the donee is a trustee for him: *Staniland v Willott* (1852) 3 Mac & G 664. As to donatio mortis causa see generally GIFTS vol 52 (2009) PARA 271 et seq.

2 *Tate v Hilbert* (1793) 2 Ves 111.

3 *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889 at 894 per Buckley J. See also *Duffield v Elwes* (1827) 1 Bli NS 497, HL; *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76 at 83, CA, per Cotton LJ; *Re Richards, Jones v Rebbeck* [1921] 1 Ch 513; and GIFTS vol 52 (2009) PARA 271. As to the liability of the donee of a donatio mortis causa for the donor's debts see *Tate v Leithead* (1854) Kay 658; and GIFTS vol 52 (2009) PARA 278.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(2) PERSONAL REPRESENTATIVES' INTEREST IN DEVOLVED PROPERTY/341. Nature of the personal representatives' interest.

(2) PERSONAL REPRESENTATIVES' INTEREST IN DEVOLVED PROPERTY

341. Nature of the personal representatives' interest.

The property which devolves upon the personal representative is held by him in right of the deceased and not in his own right¹. The entire ownership of the property comprised in the estate of a deceased person, both legal and equitable, which remains unadministered is in the deceased's legal personal representative for the purposes of administration². He has full control of all the items making up the estate and can give a good title to them³. The beneficiaries have no specific interest in any of the property comprising the residue until the residue has been ascertained in due course of administration⁴, but they do have a general title to residue, and this general title constitutes a transmissible interest⁵ which is not affected by the completion of the administration, so that their interests remain the same before and after the administration is complete⁶. A beneficiary in possession is not a trespasser, but has no answer to the personal representative's claim for possession for the purposes of the administration; he must give possession on receipt of a notice to quit, but is not liable for mesne profits until after the notice has expired⁷.

1 *Re Davis, Re Davis, Evans v Moore*[1891] 3 Ch 119 at 124, CA.

2 *Stamp Duties Comr (Queensland) v Livingston*[1965] AC 694, [1964] 3 All ER 692, PC; *Re Leigh's Will Trusts, Handyside v Durbridge*[1970] Ch 277 at 281, [1969] 3 All ER 432 at 434; *Marshall (Inspector of Taxes) v Kerr*[1995] 1 AC 148 at 157, [1994] 3 All ER 106 at 112, HL, per Lord Templeman.

3 *Attenborough v Solomon*[1913] AC 76, HL. As to the rights, duties and liabilities of personal representatives in due course of administration see PARAS 374 et seq, 761 et seq post.

4 *Stamp Duties Comr (Queensland) v Livingston*[1965] AC 694, [1964] 3 All ER 692, PC (criticising dicta of Lord Cairns LC in *Cooper v Cooper* (1874) as reported in LR 7 HL 53 at 65-66); *Re Leigh's Will Trusts, Handyside v Durbridge*[1970] Ch 277 at 281, [1969] 3 All ER 432 at 434 per Buckley J; *Marshall (Inspector of Taxes) v Kerr*[1995] 1 AC 148, [1994] 3 All ER 106, HL. See also *Lord Sudeley v A-G*[1897] AC 11, HL; *Vanneck v Benham*[1917] 1 Ch 60; *Barnardo's Homes v Income Tax Special Comrs*[1921] 2 AC 1, HL; *IRC v Smith*[1930] 1 KB 713, CA; *Corbett v IRC*[1938] 1 KB 567, [1937] 4 All ER 700, CA; *Re Cunliffe-Owen, Mountain v IRC*[1953] Ch

545 at 553-555, [1953] 2 All ER 196 at 200-201, CA, per Evershed MR. See further *Re Holmes, Villiers v Holmes*[1917] 1 IR 165. As to the special legislation governing liability to income tax during the administration of an estate see INCOME TAXATION vol 23(2) (Reissue) PARA 1531 et seq.

5 *Re Leigh's Will Trusts, Handyside v Durbridge*[1970] Ch 277, [1969] 3 All ER 432.

6 *Re Gibbs, Midland Bank Executor and Trustee Co Ltd v IRC*[1951] Ch 933 at 940, [1951] 2 All ER 63 at 68; *Re Cunliffe-Owen, Mountain v IRC*[1953] Ch 545 at 555, 560-561, [1953] 2 All ER 196 at 201, 204, CA, per Evershed MR, and at 565 and 207 per Romer LJ.

7 *Williams v Holland*[1965] 2 All ER 157, [1965] 1 WLR 739, CA. As to the power to assent subject to a mortgage see PARA 565 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(2) PERSONAL REPRESENTATIVES' INTEREST IN DEVOLVED PROPERTY/342. Effect of representative's bankruptcy.

342. Effect of representative's bankruptcy.

On the bankruptcy of the personal representative the deceased's property does not pass to the trustee in bankruptcy¹, but the creditors of the testator or intestate, by their conduct in permitting the representative to employ the assets in his business, may preclude themselves from claiming them as against the representative's creditors². Where the representative is also residuary legatee, the court will assist his trustee in bankruptcy to get in the deceased's assets³.

A lease which contains a provision for forfeiture upon the bankruptcy of the lessee, his executors, administrators or assigns is liable to forfeiture upon the bankruptcy of the lessee's representative⁴.

1 See the Insolvency Act 1986 s 283(3)(a); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 428. See also *Kitchen v Ibbetson* (1873) LR 17 Eq 46.

2 *Fox v Fisher* (1819) 3 B & Ald 135; *Kitchen v Ibbetson* (1873) LR 17 Eq 46. See also *Re Thomas* (1842) 1 Ph 159; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 390.

3 *Ex p Butler* (1749) 1 Atk 210 at 213.

4 *Doe d Bridgman v David* (1834) 1 Cr M & R 405. See generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 412-414; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 603.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(2) PERSONAL REPRESENTATIVES' INTEREST IN DEVOLVED PROPERTY/343. Right of representative's judgment creditor.

343. Right of representative's judgment creditor.

The property of a testator or intestate is not liable to be taken in execution under a judgment against his representative personally¹ unless the representative has converted the assets to his own use² or unless, from lapse of time and an enjoyment of the assets inconsistent with the trusts of the will, an inference may be raised of a gift of the property by the deceased's creditors or beneficiaries to the representative³.

- 1 *Farr v Newman* (1792) 4 Term Rep 621; *M'Leod v Drummond* (1810) 17 Ves 152 at 168 per Lord Eldon LC; *Gaskell v Marshall* (1831) 1 Mood & R 132; *Kinderley v Jervis* (1856) 22 Beav 1 at 23 per Romilly MR.
- 2 *Quick v Staines* (1798) 1 Bos & P 293, distinguished in *Gaskell v Marshall* (1831) 1 Mood & R 132.
- 3 *Ray v Ray* (1851) Coop G 264, distinguished in *Re Morgan, Pillgrem v Pillgrem* (1881) 18 ChD 93, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(2) PERSONAL REPRESENTATIVES' INTEREST IN DEVOLVED PROPERTY/344. Merger of estates.

344. Merger of estates.

In as much as the representative holds the assets not in his own right but in a fiduciary capacity, there is no merger of an estate held by the representative as such in an estate which he holds in his own right¹.

- 1 2 B1 Com (14th Edn) 177; *Re Radcliffe, Radcliffe v Bewes* [1892] 1 Ch 227, CA. See EQUITY vol 16(2) (Reissue) PARA 765.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(2) PERSONAL REPRESENTATIVES' INTEREST IN DEVOLVED PROPERTY/345. Joint representation.

345. Joint representation.

A joint representative is regarded as a single person¹. Accordingly, one of several executors may give a good discharge for a debt due to the estate², and settle an account with a person accountable to the estate, even, it would appear, against the dissent of his co-executor³; and it seems that the same principle applies to joint administrators⁴. A conveyance of real estate requires the concurrence of all proving executors or all administrators or an order of the court⁵. If one of two personal representatives contracts to sell real estate expressly on behalf of both, he seems to have authority to bind the other personal representative, but if in fact that express authority is lacking he will not obtain specific performance of the contract because a contract purporting to be made by two executors jointly cannot be enforced as if it were a contract by one executor severally; conversely, however, a contract may be specifically enforced if one of two executors contracts alone without expressly purporting to bind the other⁶.

Where several executors have been registered as the holders of stock or shares in a company incorporated under the Companies Clauses Acts, a transfer by some or one only is invalid⁷; and in the case of stock registered at the Bank of England the bank may decline to give effect to a transfer unless the instrument of transfer is executed by all the representatives⁸. The share or interest of a member in a company regulated by the Companies Act 1985 is transferable in the manner provided by the articles of the company⁹. As between themselves and the company, executors registered as the holders of shares are joint holders in their individual capacity, and any transfer of those shares must be executed by all of them¹⁰.

1 Bac Abr, Executors and Administrators (D) 1.

2 *Charlton v Earl of Durham* (1869) 4 Ch App 433.

3 *Smith v Everett* (1859) 27 Beav 446, considered in *Fountain Forestry Ltd v Edwards* [1975] Ch 1 at 13-14, [1974] 2 All ER 280 at 285 per Brightman J. In *Lepard v Vernon* (1813) 2 Ves & B 51 it was held that a court of equity would not assist such a settlement. As to one executor bringing foreclosure proceedings, the other having absconded see *Drage v Hartopp* (1885) 28 ChD 414.

4 See *Jacomb v Harwood* (1751) 2 Ves Sen 265; *Smith v Everett* (1859) as reported in 29 LJ Ch 236 at 239-240 per Romilly MR; *Fountain Forestry Ltd v Edwards* [1975] Ch 1 at 14, [1974] 2 All ER 280 at 285 per Brightman J. Cf *Hudson v Hudson* (1737) 1 Atk 460; *Warwick v Greville* (1809) 1 Phillim 123 at 126; *Stanley v Bernes* (1828) 1 Hag Ecc 221 at 221-222.

In so far as the principle still exists that denial by a lessee of his landlord's title will give rise to a forfeiture, it seems that a denial by one of several representatives may give rise to a forfeiture: see *Warner v Sampson* [1958] 1 QB 404, [1958] 1 All ER 44 (revsd on other grounds [1959] 1 QB 297, [1959] 1 All ER 120, CA); *WG Clark (Properties) Ltd v Dupre Properties Ltd* [1992] Ch 297, [1992] 1 All ER 596. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 605, 626.

As to payment of a statute-barred debt by one of several personal representatives see PARA 392 post. As to an acknowledgement by one of several personal representatives see PARA 394 post.

5 See PARA 443 post.

6 *Sneesby v Thorne* (1855) 7 De GM & G 399; *Fountain Forestry Ltd v Edwards* [1975] Ch 1, [1974] 2 All ER 280. As to the liability of a joint contractor's personal representatives see PARA 443 post. See also 124 NLJ 749 (8 August 1974).

7 *Barton v North Staffordshire Rly Co* (1888) 38 ChD 458; *Barton v London and North Western Rly Co* (1889) 24 QBD 77, CA. See COMPANIES vol 15 (2009) PARAS 1667, 1698.

8 See the Government Stock Regulations 1965, SI 1965/1420, reg 6(2). See also the National Debt Act 1870 s 23 (repealed, so far as relates to stocks falling within the regulations: see the Finance Act 1942 s 47(2), Sch 11, Pt III; Finance Act 1964 s 24, Sch 8 para 3); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1339.

9 See the Companies Act 1985 s 182(1) (as amended); and PARA 348 post. In the case of the death of a member, the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was a sole holder, are the only persons recognised by the company as having any title to his interest in the shares; but nothing in this provision releases the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons: see the Companies (Table A to F) Regulations 1985, SI 1985/805, Schedule Table A, reg 29; and COMPANIES vol 14 (2009) PARAS 228, 343; COMPANIES vol 15 (2009) PARA 1143.

10 See COMPANIES vol 15 (2009) PARA 1698.

UPDATE

345 Joint representation

NOTE 8--SI 1965/1420 replaced: Government Stock Regulations 2004, SI 2004/1611.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(2) PERSONAL REPRESENTATIVES' INTEREST IN DEVOLVED PROPERTY/346. Apportionment.

346. Apportionment.

All rents¹, annuities², dividends³ and other periodical payments⁴ in the nature of income are considered as accruing from day to day⁵. Accordingly, unless the instrument in question provides to the contrary⁶, the personal representative of a person entitled to a life interest is entitled to the apportioned part of all such payments made after the death⁷ of the deceased in so far as they relate to any period before the death⁸. Where the investments or other property yielding the income so apportionable have been appropriated or transferred to other persons absolutely entitled before the payment has been made, the personal representative is entitled to recover the apportioned part from the trustees or from the persons to whom they have been transferred, as the case may be⁹. Where, however, such investments have been sold cum dividend, the personal representative has no right, except in special circumstances, to any apportioned part of the proceeds of sale¹⁰, for it is not practicable to calculate such an apportionment¹¹.

1 'Rents' includes rent service, rentcharge and rent seck and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithes: Apportionment Act 1870 s 5. Cf the Administration of Estates Act 1925, for the purposes of which 'rent' includes a rent service or a rentcharge or other rent, toll, duty or annual or periodical payment in money or money's worth issuing out of or charged upon land, but does not include mortgage interest; and 'rentcharge' includes a fee farm rent: s 55(1)(xxi).

2 'Annuities' includes salaries and pensions: Apportionment Act 1870 s 5.

3 'Dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such companies, whether such payments are usually made or declared at any fixed times or otherwise; and all such divisible revenue is, for the purposes of the Apportionment Act 1870, deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the revenue is declared or expressed to be made, but 'dividend' does not include payments in the nature of a return or reimbursement of capital: s 5.

4 Annual sums payable under insurance policies are not apportionable: *ibid* s 6.

5 *Ibid* s 2.

6 The effect of the Apportionment Act 1870 can be excluded by express stipulation: s 7.

7 If a landlord dies on the day when payment is due, the rents when received are income of the estate since the rent is not due until the end of that day: *Re Aspinall, Aspinall v Aspinall* [1961] Ch 526, [1961] 2 All ER 751. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 259.

8 See the Apportionment Act 1870 s 4. See also *Re Muirhead, Muirhead v Hill* [1916] 2 Ch 181; *Re Henderson, Public Trustee v Reddie* [1940] Ch 368, [1940] 1 All ER 623. Payments made or accrued due before death are treated as capital and are not apportionable: *Re Aspinall, Aspinall v Aspinall* [1961] Ch 526, [1961] 2 All ER 751.

9 *Re Henderson, Public Trustee v Reddie* [1940] Ch 368, [1940] 1 All ER 623.

10 *Bulkeley v Stephens* [1896] 2 Ch 241; *Re Walker, Walker v Patterson* [1934] WN 104; *Re Firth, Sykes v Hall* [1938] Ch 517, [1938] 2 All ER 217; *Re Winterstoke's Will Trust, Gunn v Richardson* [1938] Ch 158, [1937] 4 All ER 63; *Re Henderson, Public Trustee v Reddie* [1940] Ch 368, [1940] 1 All ER 623.

11 *Re Henderson, Public Trustee v Reddie* [1940] Ch 368, [1940] 1 All ER 623.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(3) DEVOLUTION OF CHATTELS/347. Chattels.

(3) DEVOLUTION OF CHATTELS

347. Chattels.

All movable chattels have always devolved as personal property¹; but certain chattels are so closely annexed to the inheritance that they accompany the land as realty, and accordingly at the time when land did not vest in the personal representative² they passed direct to the heir or devisee. Deer in a park, unless reclaimed and confined³, or fish in a pond are chattels of such a nature⁴.

The same applies to heirlooms which accompany the inheritance, whether they pass by special custom, such as the best bed or the like, or whether they savour of the inheritance. In the latter class are included title deeds and the chest or box in which they are usually kept, the patent creating a dignity⁵, the garter and collar of a knight⁶, an ancient horn where the tenure is by cornage⁷, and the ancient jewels of the Crown⁸.

The right of an undischarged bankrupt to hold goods acquired after bankruptcy until the intervention of the trustee in bankruptcy is a right which is transmissible to his personal representative⁹.

1 Godolphin's Orphan's Legacy, Pt I c 13.

2 As to the devolution of real estate see PARA 363 post.

3 *Morgan v Earl of Abergavenny* (1849) 8 CB 768; *Ford v Tynte* (1861) 2 John & H 150; *Inglewood Investment Co Ltd v Forestry Commission* [1988] 1 All ER 783, [1988] 1 WLR 1278. See also ANIMALS vol 2 (2008) PARAS 712, 974.

4 2 Bl Com (14th Edn) 427-428.

5 The provisions of the Law of Property Act 1925 do not affect the limitation of, or authorise any disposition to be made of, any title or dignity of honour which in its nature is inalienable: s 201(2). See also PARA 335 ante.

6 *Earl of Northumberland's Case* (1584) Owen 124.

7 *Pusey v Pusey* (1684) 1 Vern 272.

8 *Hill v Hill* [1897] 1 QB 483 at 494, CA, per Chitty LJ; Co Litt 18b. See also REAL PROPERTY vol 39(2) (Reissue) PARA 89.

9 *Fyson v Chambers* (1842) 9 M & W 460. As to after acquired property see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 445-448, 471.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(3) DEVOLUTION OF CHATTELS/348. Shares in a company.

348. Shares in a company.

Whatever the nature of a company's assets¹, the shares or other interest of any member are personal estate, transferable² in the manner provided by the articles of the company (or by a stock transfer) and not of the nature of real estate³. On the death of a sole⁴ holder of shares the title to his shares devolves upon his personal representatives⁵.

1 As to the power to hold land see COMPANIES vol 14 (2009) PARA 317.

2 As to methods of transfer see COMPANIES vol 14 (2009) PARA 389 et seq; and as to the rights of a survivor under a joint holding of shares see PARA 345 ante.

3 See the Companies Act 1985 s 183(3); and COMPANIES vol 14 (2009) PARA 398.

4 As to the position on the death of a joint holder see PARA 345 ante.

5 See COMPANIES vol 15 (2009) PARA 1145.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(3) DEVOLUTION OF CHATTELS/349. Emblements.

349. Emblements.

Certain produce of the soil passes as personal estate. Where the occupier of land who has an estate determining with his own life has sown or planted the soil with a view to raising a crop, and dies before harvest time, his personal representatives as against the remainderman are entitled to the profits of the crop as compensation for the labour and expense of tilling, manuring and sowing the land¹. Such profits are called emblements².

The estate of a life tenant is not entitled against a remainderman or a subsequent tenant for life if the crop was sown not by the deceased life tenant but by the settlor³.

If an owner of an estate of inheritance in the land sowed a crop and then died before harvest time, then under the former law⁴ the crop devolved as personal estate upon his personal representatives as against his heir⁵, but did not so devolve as against a devisee of the land under his will⁶ unless the will showed an intention that the crops should be excepted out of the devise⁷. Under the present law the crops will in any case vest in the owner's personal representatives on his death, but it seems that the authorities under the former law as to the effect of a devise and of exception out of the devise will still apply in relation to the equitable interest in growing crops⁸.

1 2 Bl Com (14th Edn) 122; *Lawton v Lawton* (1743) 3 Atk 13 at 16.

2 As to emblements see generally AGRICULTURAL LAND vol 1 (2008) PARA 369.

3 *Anon* (1608) Godb 159; *Grantham v Hawley* (1615) Hob 132.

4 As to the difference which formerly existed between the devolution of personal property and real property see PARA 335 ante.

5 2 Bl Com (14th Edn) 403-404; *Lawton v Lawton* (1743) 3 Atk 13 at 16.

6 *Cooper v Woolfitt* (1857) 2 H & N 122.

7 *West v Moore* (1807) 8 East 339; *Cox v Godsalve* (1699) 6 East 604n. A gift of stock upon a farm is sufficient to pass crops as emblements: see *Re Roose*, *Evans v Williamson* (1880) 17 ChD 696, following *West v Moore* supra, and *Cox v Godsalve* supra, and disapproving *Vaisey v Reynolds* (1828) 5 Russ 12.

8 See PARA 335 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(3) DEVOLUTION OF CHATTELS/350. Natural products of the soil.

350. Natural products of the soil.

The natural products of the soil devolve with the land unless they have been actually severed in the lifetime of the deceased owner, or have been granted to him separately from the land¹. To cut down ornamental trees or timber, except in the case of estates which are cultivated merely for the produce of saleable timber and where the timber is cut periodically², or except in accordance with a prevailing local usage³, is an act of waste on the part of a limited owner, such as a tenant for life. Accordingly, on the death of the owner the beneficial interest in the trees or timber, whether cut down or blown down in his lifetime⁴, or the proceeds of their sale, devolved upon the owner of the first estate of inheritance, or passed upon the trusts of the settlement⁵. Where the limited owner dies after 1925 the legal title to it appears to vest in his special personal representatives (if any)⁶.

1 *Went Off Ex* (14th Edn) 147; *Re Ainslie, Swinburn v Ainslie* (1885) 30 ChD 485, CA.

2 *Honywood v Honywood* (1874) LR 18 Eq 306 at 309.

3 *Dashwood v Magniac* [1891] 3 Ch 306 at 357, CA.

4 *Herlakenden's Case* (1589) 4 Co Rep 62a at 63b.

5 *Bewick v Whitfield* (1734) 3 P Wms 267; *Marquis of Ormond v Kynnersley* (1830) cited in 15 Beav 10; *Lushington v Boldero* (1851) 15 Beav 1.

6 As to the devolution of settled land see PARA 367 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(3) DEVOLUTION OF CHATTELS/351. Ornamental and trade fixtures.

351. Ornamental and trade fixtures.

The general maxim of the law is that whatever is annexed to land becomes part of the land¹, but upon this maxim certain exceptions have been engrafted in respect of both ornamental and trade fixtures². These exceptions become of importance in cases where the person who has annexed the chattel had only a life interest in the property to which the chattel has been annexed.

The personal representative of a tenant for life who has affixed a chattel to the freehold is entitled to remove it³ where, from the nature of the chattel, it is evident that it has been attached to the freehold for the purpose of ornamentation and for its better enjoyment as a chattel⁴, or has been affixed as machinery⁵ to the freehold for the purpose of trade. The degree and object of attachment must be considered for this purpose. There need not be an inquiry into the motive of the person who affixed the chattel but the object and purpose are to be inferred from the circumstances of the case⁶. On the death of an owner in fee simple or of a term of years⁷, however, chattels, whether fixed for trade purposes⁸ or for the purpose of ornamentation⁹, pass with the land to which they are fixed¹⁰.

1 *Holland v Hodgson* (1872) LR 7 CP 328 at 334, Ex Ch, per Blackburn J. The question whether or not a chattel has been annexed depends partly on the degree of physical fixation and partly on the intent to be inferred from the circumstances. Absence of fixation does not prevent a chattel from being annexed, nor does physical fixation prevent it from remaining a chattel if the intent as derived from the circumstances so decrees. See cases cited in note 6 infra.

2 *Elliott v Bishop* (1854) 10 Exch 496 at 507-508 per Martin B; *Lord Dudley v Lord Warde* (1751) Amb 113; *Lawton v Lawton* (1743) 3 Atk 13. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 179-180.

3 *Re Hulse, Beattie v Hulse* [1905] 1 Ch 406.

4 *Re De Falbe, Ward v Taylor* [1901] 1 Ch 523, CA (disapproving *D'Eyncourt v Gregory* (1866) LR 3 Eq 382, and explaining *Norton v Dashwood* [1896] 2 Ch 497); affd sub nom *Leigh v Taylor* [1902] AC 157, HL. See also *Viscount Hill v Bullock* [1897] 2 Ch 482, CA; and cf *Bulkeley v Lyne Stephens, Re Lyne Stephens, Lyne Stephens v Lubbock* (1895) 11 TLR 564.

5 *Lawton v Lawton* (1743) 3 Atk 13; *Lord Dudley v Lord Warde* (1751) Amb 113; *Lawton v Salmon* (1782) 1 Hy Bl 260n; *Re Hulse, Beattie v Hulse* [1905] 1 Ch 406.

6 *Re De Falbe, Ward v Taylor* [1901] 1 Ch 523 at 535, CA, per Vaughan Williams LJ; affd sub nom *Leigh v Taylor* [1902] AC 157, HL.

7 *Finney v Grice* (1878) 10 ChD 13; but cf *Re Seton-Smith, Burnand v Waite* [1902] 1 Ch 717.

8 *Bain v Brand* (1876) 1 App Cas 762, HL.

9 *Re Whaley, Whaley v Roehrich* [1908] 1 Ch 615.

10 *Re Lord Chesterfield's Settled Estates* [1911] 1 Ch 237; *Norton v Dashwood* [1896] 2 Ch 497; *Lawton v Salmon* (1782) 1 Hy Bl 260n; *Fisher v Dixon* (1845) 12 Cl & Fin 312, HL.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(3) DEVOLUTION OF CHATTELS/352. Exercise of deceased's power of election.

352. Exercise of deceased's power of election.

Where a person at his death was entitled out of several chattels to take his choice of one or more for his own use under a grant which conferred an immediate interest, and did not do so, his representative might claim by election¹, but if no interest passed to the deceased person in his lifetime, his representative could not claim to elect². Similarly, where there was a lease to a person of several acres, parcel of a large number of acres, and the lessee died before making an election, his representative might make it³.

1 Toller's Law of Executors (7th Edn) 173. Where a condition not personal to the legatee gives an option to the legatee to perform one of two or more things within a particular period previously to the vesting of the bequest, the right of election may be exercised by his representatives: see Roper's Legacies (4th Edn) 777; *Re Goodwin, Ainslie v Goodwin* [1924] 2 Ch 26.

2 Toller's Law of Executors (7th Edn) 173; Co Litt 145a; Com Dig, Election (B).

3 *Jones v Cherney* (1680) Freem KB 530.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(4) DEVOLUTION OF CHOSSES IN ACTION/353. Devolution of choses in action generally.

(4) DEVOLUTION OF CHOSSES IN ACTION

353. Devolution of choses in action generally.

Upon the death of any person, choses in action to which he was entitled are in general included in the property which passes to his personal representative¹. An interest in a chose in action which the deceased had jointly with another person who survives him will, however, pass not to the deceased's personal representatives but by survivorship to the other person²; where a contract is founded upon personal consideration, the death of either party puts an end to it³; and property (including any thing in action) vested in a corporation sole passes to the successors of the corporation sole⁴.

A covenant relating to land of the covenantee made after 1925 is deemed to be made with the covenantee and his successors in title⁵.

The survival of causes of action in favour of, or against, personal representatives is considered elsewhere in this title⁶.

Where before 1926 the owner of an equity of redemption, on paying off a mortgage by demise, prevented the mortgage debt from merging by a declaration that it should be kept alive for his protection against mesne encumbrances, and then died intestate, the mortgage debt passed as personalty even though expressed to be payable to the mortgagee, his heirs and assigns⁷.

1 Went Off Ex (14th Edn) 159; cf the definition of 'personal estate' in the Wills Act 1837 s 1 (as amended) (by which 'personal estate' for the purposes of the Act extends to chattels real); and PARA 335 ante. As to choses in action generally see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

2 *Southcote v Hoare* (1810) 3 Taunt 87 (benefit of covenant made with joint covenantor). As to the construction of such a covenant if made after 1925 see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 261 et seq. Cf the Administration of Estates Act 1925 s 3(4) (see PARA 366 post). As to the special rule applicable to partnership property see PARA 338 ante.

3 See PARA 762 post; and CONTRACT vol 9(1) (Reissue) PARA 1078.

4 See the Law of Property Act 1925 s 180(1) (cited in relation to chattels real in PARA 361 post); and CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1248, 1271.

5 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 256.

6 See PARA 814 post.

7 *Re Gibbon, Moore v Gibbon*[1909] 1 Ch 367. The powers of making such a declaration were restricted by the Law of Property Act 1925 s 116: see MORTGAGE vol 77 (2010) PARA 642. As from 1 January 1926 this possibility of real and personal property passing to different persons on an intestacy is avoided, as both pass together under the rules of distribution.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(4) DEVOLUTION OF CHOSSES IN ACTION/354. Bills of exchange.

354. Bills of exchange.

The title to bills of exchange, cheques, and promissory notes passes on the death of the holder to his personal representatives, who may sue on the instrument or negotiate it¹.

1 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1607.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(4) DEVOLUTION OF CHOSSES IN ACTION/355. Right to exercise option to take shares.

355. Right to exercise option to take shares.

The representatives of a member of a limited company, being entitled to the privileges as well as to the burdens of membership, may, so long as the name of the deceased member remains on the register, claim to avail themselves of an offer of new shares made to the members of the company during the lifetime of the deceased member¹.

¹ *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(4) DEVOLUTION OF CHOSSES IN ACTION/356. Compensation to tenant.

356. Compensation to tenant.

Under the statutory provisions relating to agricultural holdings¹ and business premises² the representatives of a landlord tenant for life who have been compelled to pay compensation to a tenant are entitled to a charge upon the holding in respect of the amount which they have so paid³.

Interests qualifying for compensation for depreciation of the value of land caused by the use of public works⁴, or for claiming farm loss payments⁵ may be acquired by inheritance, and a personal representative may serve a blight notice⁶.

¹ See the Agricultural Holdings Act 1986 s 86; and AGRICULTURAL LAND vol 1 (2008) PARA 474 et seq.

² See the Landlord and Tenant Act 1927 s 12, Sch 1 (as amended); and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 801.

³ *Re Agricultural Holdings (England) Act 1883, Gough v Gough* [1891] 2 QB 665, CA.

⁴ See the Land Compensation Act 1973 s 11 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 886 et seq.

⁵ See *ibid* s 36(3).

⁶ See the Town and Country Planning Act 1990 s 161(1); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 547; TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 987 et seq, 992 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(4) DEVOLUTION OF CHOSSES IN ACTION/357. Insurance policies.

357. Insurance policies.

The exclusive right of a personal representative to receive and give a discharge for money due upon policies effected by the deceased upon the life of the deceased is subject to the terms of the contract of insurance¹.

An insurance effected on his or her life by one spouse and expressed to be for the benefit of the other or of their children creates a trust so that the money payable does not form part of the insured's estate; if trustees have been appointed, the money is payable to them, but in default of such appointment it is payable to the insured's personal representatives in trust for the beneficiaries².

1 *O'Reilly v Prudential Assurance Co Ltd* [1934] Ch 519, CA, where policies were provided for payment to the insured's executor or administrator, subject to a proviso that a receipt for the policy money by any relation of the insured should discharge the insurers and be conclusive evidence of payment to the person lawfully entitled; the insurers, in ignorance of the existence of a grant of administration to the insured's estate, paid the policy money to a relation of the insured, and took a receipt from her, and a claim against them by the insured's administratrix failed. See also *Da Costa v Prudential Assurance Co* (1918) 120 LT 353, CA. It is, however, doubtful whether the insurers could rely on such a proviso if at the time of payment they knew of the existence of a personal representative of the insured or that his estate was liable to estate duty: *O'Reilly v Prudential Assurance Co Ltd* supra at 534 per Romer LJ, and at 535 per Maugham LJ.

2 See the Married Women's Property Act 1882 s 11 (as amended); and INSURANCE vol 25 (2003 Reissue) PARA 558.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(4) DEVOLUTION OF CHOSES IN ACTION/358. Patents and copyright.

358. Patents and copyright.

Where, in respect of patents granted and applications made before 1 June 1978, a person claiming to be the inventor of an invention died without making application for a patent, the application could be made by, and the patent granted to, his legal personal representative¹. On or after 1 June 1978 a patent may be granted to the successor or successors in title of the inventor².

The rules of law applicable to the devolution of personal property generally apply to patents³. Special provisions apply to patents held in co-ownership⁴ but such provisions do not affect the rights or obligations of the trustees or personal representatives of a deceased person⁵.

Copyright is transmissible by testamentary disposition as personal or movable property⁶.

1 See the Patents Act 1949 s 1(3); the Patents Act 1977 s 127, Sch 1 (as amended). The last of such patents expired in 1998: see the Patents Act 1949 s 22(3); and the Patents Act 1977 Sch 1 para 4 (as amended). See also PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARAS 302, 304.

2 See *ibid* s 7(2); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 307.

3 As to the devolution of personal property see PARA 335 ante.

4 See the Patents Act 1977 s 36; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 372. As to patents granted before 1 June 1978 see the Patents Act 1949 s 55; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARAS 302, 304.

5 See the Patents Act 1977 s 36; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 372. No directions in relation to patents may be made by the Comptroller-General of Patents, Designs and Trademarks so as to affect the rights or obligations of the trustees or personal representatives of a deceased person: see s 8(8); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 362.

6 See the Copyright, Designs and Patents Act 1988 s 90(1); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 172. As to the transmission and creation of interests in copyright generally see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 158.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(4) DEVOLUTION OF CHOSSES IN ACTION/359. Causes of action.

359. Causes of action.

Causes of action vested in a person at the time of his death survive for the benefit of his estate. This subject and the qualifications of this principle are considered subsequently¹.

1 See PARA 814 et seq post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(5) DEVOLUTION OF CHATTELS REAL/360. Leaseholds.

(5) DEVOLUTION OF CHATTELS REAL

360. Leaseholds.

The vesting of a term of years¹ in the deceased's personal representative is by operation of law². The executor who accepts the office cannot waive the terms³, and is bound by covenants contained in a lease⁴. The vesting, being a conclusion of law, is not an assignment within a clause in a lease restraining assignment⁵.

A yearly tenant's interest is transmissible to the deceased's personal representative⁶, and notice to quit must be given to him⁷. The interest of a statutory tenant under the rent restriction legislation is a personal right which cannot be transmitted by will⁸ and which does not vest in the tenant's personal representative⁹.

1 As to the legislation affecting leaseholds generally see LANDLORD AND TENANT. The Landlord and Tenant Act 1954 s 41 (as amended) contains special provisions for the protection of beneficiaries where a business tenancy is held on trust: see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 763. 'Term of years absolute' has the same meaning in the Administration of Estates Act 1925 as it has in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 678): Administration of Estates Act 1925 s 55(1)(xxiv).

2 *Ackland v Pring* (1841) 2 Man & G 937 at 952. See the Administration of Estates Act 1925 ss 1, 3(1) (as amended); and PARAS 4 ante, 363-364 post. As to the liability of the representative for rent see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 596. As to the right to enfranchise leaseholds see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1389 et seq.

3 *Billinghurst v Speerman* (1695) 1 Salk 297.

- 4 *Lloyds Bank Ltd v Jones*[1955] 2 QB 298, [1955] 2 All ER 409, CA. See also PARA 772 post
- 5 *Seers v Hind* (1791) 1 Ves 294. As to such clauses generally see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 481 et seq.
- 6 *Doe d Shore v Porter* (1789) 3 Term Rep 13; *James v Dean* (1805) 11 Ves 383 at 393.
- 7 *Parker d Walker v Constable* (1769) 3 Wils 25.
- 8 *John Lovibond & Sons Ltd v Vincent*[1929] 1 KB 687, CA. As to statutory tenancies see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 831 et seq.
- 9 *Skinner v Geary*[1931] 2 KB 546, CA; *Drury v Johnston*[1928] NI 25. As to the protection afforded members of a statutory tenant's family after his death, see the Rent Act 1977 s 2 (as amended), Sch I Pt I; the Housing Act 1988 s 17; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 840 et seq, 1016, 1084.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(5) DEVOLUTION OF CHATTELS REAL/361. Lease to corporation sole.

361. Lease to corporation sole.

Any property¹ or any interest in it which, at any time, is or has been vested in a corporation sole (including the Crown), unless and until otherwise disposed of by the corporation, passes and devolves to and vests in, and is deemed always to have passed and devolved to or vested in, the successors from time to time of the corporation².

1 'Property' includes a thing in action and any interest in real or personal property: Law of Property Act 1925 s 205(1)(xx).

2 Ibid s 180(1). See also the Administration of Estates Act 1925 s 3(5); and PARA 366 post. See further CORPORATIONS vol 9(2) (2006 Reissue) PARA 1248. Before 1926 a lease for years made to a corporation sole and his successors passed to the personal representative and not to the successors of the corporation sole: Co Litt 49b.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(5) DEVOLUTION OF CHATTELS REAL/362. Next presentations of benefice.

362. Next presentations of benefice.

Where a benefice becomes vacant and either (1) the registered patron who would have been entitled to present upon the vacancy is dead and the person to whom the right of patronage is to be transferred has not before the vacancy occurs been registered as a patron of that benefice; or (2) the registered patron dies during the vacancy, then the right of presentation to that benefice upon that vacancy is exercisable by that patron's personal representatives¹.

1 Patronage (Benefices) Measures 1986 s 21. The same was true under the former law: see *R v Fane* (1589) 4 Leon 107 at 109. The principle did not previously apply to donative benefices, the right of donation of which passed to the heir (*Repington v Governors of Tamworth School* (1763) 2 Wils 150), but all donated

benefices have long since become presentative: see ECCLESIASTICAL LAW. As to restrictions on the exercise of patronage see ECCLESIASTICAL LAW.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(6) DEVOLUTION OF REAL ESTATE/363. Statutory devolution on personal representative.

(6) DEVOLUTION OF REAL ESTATE

363. Statutory devolution on personal representative.

Upon a death after 1925¹ real estate² to which the deceased was entitled for an interest not ceasing on his death³ devolves from time to time, notwithstanding any testamentary disposition of it, on his personal representative in like manner as before 1926⁴ chattels real devolved on the personal representative from time to time of a deceased person⁵.

1 On the death intestate before 1 January 1898 of a beneficial owner, real estate devolved immediately upon his heir, subject (in cases where such rights attached) to rights of dower, freebench and curtesy (see REAL PROPERTY vol 39(2) (Reissue) PARA 34), and subject also, after 1 September 1890, to the widow's right under the Intestates' Estates Act 1890 in cases where that Act applied. The estate was also liable, in due course of administration, for the intestate's debts. Where, however, a will directed that the executors should sell the testator's land, they had what was known as a common law power of sale, which was exercisable by those who had accepted probate, without the concurrence of those who had renounced, and by the executors of the last surviving executor, but not by an administrator with the will annexed. Although under the power the executors did not take the legal estate, as soon as the power was executed the legal estate was in the purchaser. See *Warneford v Thompson* (1797) 3 Ves 513; *Doe d Hampton v Shotton* (1838) 8 Ad & El 905; *Forbes v Peacock* (1840) 11 Sim 152; *Peppercorn v Wayman* (1852) 5 De G & Sm 230; *Re Clay v Tetley* (1880) 16 ChD 3, CA; *Re Fisher* (1884) 13 Lr Ir 546; *Re Mainwaring, Crawford v Forshaw* [1891] 2 Ch 261, CA.

If the deceased died between 1 January 1898 and 31 December 1925, such of his real estate as was vested in him without a right in any other person to take by survivorship (other than land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor was necessary to perfect the title of a purchaser from the customary tenant) vested in his personal representative or representatives from time to time as if it were a chattel real, to be held with and subject to the powers, rights, duties and liabilities mentioned in the Land Transfer Act 1897 in trust for the persons by law beneficially entitled to it; and such persons had the same power of requiring a transfer of the real estate as persons beneficially entitled to personal estate had of requiring a transfer of such personal estate.

2 For the meaning of 'real estate' see PARA 364 post. As to partnership property see PARA 338 ante; as to chattels real see PARA 360 ante; as to trust and mortgage estates see PARA 368 et seq post; and as to settled land see PARA 367 post.

3 See PARA 366 post.

4 Before 1926, the legal estate vested in all the executors irrespective of the question whether they had obtained probate or not, in as much as an executor derives his title from the will and not from probate; but it seems that the estate was divested by the executor renouncing probate: see *Re Pawley and London and Provincial Bank* [1900] 1 Ch 58. In case of an intestacy, in as much as an administrator derived his title from the grant of letters of administration, it was held that until administration was taken out the legal estate in the intestate's land devolved on his heir at law: see *Wankford v Wankford* (1704) 1 Salk 299; *John v John* [1898] 2 Ch 573; *Re Griggs, ex p London School Board* [1914] 2 Ch 547, CA.

5 Administration of Estates Act 1925 s 1(1). Subject to the provisions of that Act, all enactments and rules of law, and all jurisdiction of any court with respect to the appointment of administrators or to probate or letters of administration, or to dealings before probate in the case of chattels real, and with respect to costs and other matters in the administration of personal estate, in force before 1 January 1926, and all powers, duties, rights, equities, obligations and liabilities of a personal representative in force on that date with respect to chattels real, apply and attach to the personal representative and have effect with respect to real estate vested in him, and in particular all such powers of disposition and dealing as were before 1926 exercisable as respects chattels real by the survivor or survivors of two or more personal representatives, as well as by a single personal

representative, or by all the personal representatives together, are exercisable by the personal representative or representative of the deceased with respect to his real estate: s 2(1). As to the general necessity for the concurrence in a conveyance of all the personal representatives who have taken a grant see s 2(2) (as amended); and PARA 443 post. Without prejudice to the rights and powers of personal representatives, the appointment of a personal representative in regard to real estate does not, save as in that Act provided, affect: (1) any rule as to marshalling or as to administration of assets; (2) the beneficial interest in real estate under any testamentary disposition; (3) any mode of dealing with any beneficial interest in real estate or the proceeds of sale of it; or (4) the right of any person claiming to be interested in real estate to take proceedings for its protection or recovery against any person other than the personal representative: s 2(3). On a death intestate after 1925 the real estate vests, pending a grant of administration, in the President of the Family Division: see PARA 34 ante. Equitable interests can be disposed of subject and without prejudice to the estate and powers of a personal representative: see the Wills Act 1837; and WILLS vol 50 (2005 Reissue) PARA 315.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(6) DEVOLUTION OF REAL ESTATE/364. Meaning of 'real estate'.

364. Meaning of 'real estate'.

For the purpose of the statutory provisions as to devolution, 'real estate' includes: (1) chattels real, and land¹ in possession, remainder or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death²; and (2) real estate held on trust³ (including settled land)⁴ or by way of mortgage or security but not money charged on land⁵.

1 'Land' has the same meaning as in the Law of Property Act 1925 (see REAL PROPERTY vol 39(2) (Reissue) PARA 77): Administration of Estates Act 1925 s 55(1)(via) (definition added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 6(1), (5)). Prior to 1 January 1997, land was defined in accordance with the Settled Land Act 1925 s 117(1)(ix) (see SETTLEMENTS vol 42 (Reissue) PARA 680): see the Administration of Estates Act 1925 s 55(1)(xxiv) (as originally enacted); and PARA 231 ante.

2 Ibid s 3(1)(i).

3 Property held in trust by two or more persons falls within the exception mentioned in PARA 366 text and note 5 post, and pass by survivorship. As to devolution on the death of a sole trustee see further PARA 368 post.

4 As to the devolution of the legal estate in settled land see PARA 367 post.

5 Administration of Estates Act 1925 s 3(1)(ii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(6) DEVOLUTION OF REAL ESTATE/365. Meaning of 'personal representative'.

365. Meaning of 'personal representative'.

For the purpose of the statutory provisions as to devolution, 'personal representative' means the executor, original or by representation, or administrator for the time being of the deceased¹. Accordingly, the real estate vests in all the executors named in the will, whether they have proved the will or not, with the exception of those who have survived the testator but have died without having taken out probate, or have renounced probate or have failed to

appear to a citation to take probate²; but the proving executors can sell without the concurrence of any who do not prove³. Where, however, a person appoints special executors of his property abroad, and general executors, his real estate in England and Wales vests in the latter to the exclusion of the former, and the general executors can make good title to it⁴.

1 See PARA 4 ante.

2 See the Administration of Estates Act 1925 s 5; and PARAS 27, 47 et seq ante. As to the effect of renunciation and failure to appear to a citation to take probate see PARAS 27, 94 et seq ante.

3 See *ibid* s 2(2) (as amended); and PARA 443 post. The practical effect of this is that it is safe to deal with all such personal representatives as have taken a grant.

4 *Re Cohen's Executors and LCC* [1902] 1 Ch 187. As to the power of special personal representatives and general personal representatives to dispose of settled land and free estate respectively see PARA 237 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(6) DEVOLUTION OF REAL ESTATE/366. Deeming provisions.

366. Deeming provisions.

A testator is deemed to have been entitled at his death to any interest in real estate¹ passing under any gift contained in his will which operates as an appointment under a general power to appoint by will or operates under the testamentary power conferred by statute² to dispose of an entailed interest³. Unless disposed of under the statutory power, an entailed interest of a deceased person is deemed an interest ceasing on his death⁴. The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death⁵. On the death of a corporation sole his interest in the corporation's real and personal estate is deemed to be an interest ceasing on his death and devolving on his successor⁶.

1 For the meaning of 'real estate' see PARA 364 ante.

2 See the Law of Property Act 1925 s 176; and REAL PROPERTY vol 39(2) (Reissue) PARA 140; WILLS vol 50 (2005 Reissue) PARA 329.

3 Administration of Estates Act 1925 s 3(2). See further PARA 372 post. As to entailed interests see REAL PROPERTY vol 39(2) (Reissue) PARA 119.

4 *Ibid* s 3(3). Any further or other interest of the deceased in the same property in remainder or reversion which is capable of being disposed of by his will is not, however, deemed to be an interest so ceasing: s 3(3).

5 *Ibid* s 3(4). In the case of beneficial joint tenants, both the legal estate and the beneficial interest pass by survivorship. Despite the statutory provision by which land limited to joint tenants is held in trust, a surviving joint tenant who is solely and beneficially interested may deal with his legal estate as if it were not held in trust: see the Law of Property Act 1925 s 36(2) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 206. Where only the legal estate is held jointly (ie where there is a beneficial tenancy in common: see the Law of Property Act 1925 ss 34, 39(4), Sch 1 Pt IV (all as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 55 et seq), only the legal estate passes by survivorship, and any interest of the deceased which does not cease on his death passes to his personal representative. As to the beneficial interest in partnership property see PARA 338 ante.

6 Administration of Estates Act 1925 s 3(5). This provision applies on the demise of the Crown as regards all property, real and personal, vested in the Crown as a corporation sole: s 3(5). See also the Law of Property Act 1925 s 180(1) (see PARA 361 ante); and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1248.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(6) DEVOLUTION OF REAL ESTATE/367. Devolution of settled land.

367. Devolution of settled land.

A legal estate in settled land¹ vested in a person as tenant for life², where the settlement ceases on his death, devolves upon his general personal representative³. Where in such a case the settlement does not so cease, the land may devolve upon the trustees of the settlement either under a special limited grant or under a general grant including settled land⁴; where the trustees of the settlement are cleared off, the tenant for life's general personal representatives may obtain a grant in respect of the settled land⁵. Upon the death of a tenant *pur autre vie*⁶ the legal estate devolves in the same manner as settled land; the beneficial interest of the tenant, which is an equitable interest only, passes to his personal representative as being an interest not ceasing on his death⁷.

1 Except in the case of a settlement created on the occasion of an alteration in any interest in, or of a person becoming entitled under, a settlement which was in existence on 1 January 1997 or derives from a settlement in existence on that date, from 1 January 1997 no settlement for the purposes of the Settled Land Act 1925 can be created and no settlement is deemed to be a settlement under that Act: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(1), (2); and SETTLEMENTS vol 42 (Reissue) PARA 606. A settlement for the purposes of the Settled Land Act 1925 will permanently cease where, at any time after 1 January 1997, there is no land or personal chattels to which the Settled Land Act 1925 s 67(1) (heirlooms) applies subject to the settlement: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(4); and SETTLEMENTS vol 42 (Reissue) PARA 606.

2 See the Settled Land Act 1925 ss 1 (as amended), 2, 19, 20 (as amended). After 1925, the legal estate in fee simple or other the whole legal estate subject to the settlement is vested in the tenant for life or in the trustees of the settlement as statutory owners: see SETTLEMENTS vol 42 (Reissue) PARA 1020.

3 *Re Bridgett and Hayes' Contract* [1928] Ch 163; *Re Bordass* [1929] P 107. On the death of the deceased, land may cease to be settled land under one settlement and immediately become settled under another, and will not then so vest in the general personal representative: *Re Taylor* [1929] P 260.

4 As to the circumstances in which a general grant expressly including settled land may be made see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 29 (as substituted); and PARA 230 ante. A grant in respect of the free estate only, where there is also settled land, expressly excludes settled land: see r 29(3) (as substituted); and PARA 230 ante.

5 See *ibid* r 29(2)(iii) (as substituted). See also note 3 *supra*; and PARA 230 ante.

6 On the death of a tenant *pur autre vie* after 1897 and before 1926, the legal estate which his heir would formerly have taken as special occupant passed to the deceased tenant's personal representative: see the Land Transfer Act 1897 s 1 (repealed).

Before 1898 an estate *pur autre vie* in realty was never strictly an estate of inheritance and, although it was limited to a man and his heirs, the heir took not by descent but as special occupant: see *Northern v Carnegie* (1859) 4 Drew 587. To ascertain whether an estate *pur autre vie* went to the heir or executor it was necessary to look at the terms of the last conveyance, and not at the original grant; if it was to go to the heir express words were necessary and, in a deed at all events, the word 'heir' must have been used: see *Earl of Mountcashell v More Smyth* [1896] AC 158, HL. In regard to equitable estates, the fact that the legal estate was conveyed to a trustee and his heirs was not sufficient to support an inference that the equitable estate must be treated as if the beneficiary's heir had been named as special occupant, nor did the fact that a testator, seised of an estate *pur autre vie* limited to himself and his heirs, devised the whole equitable interest in it to one person entitle that person's heirs to claim as special occupants: see *Earl of Mountcashell v More Smyth* *supra*; *Re Inman, Inman v Inman* [1915] 1 Ch 187; *Sheffield v Lord Mulgrave* (1794) 5 Term Rep 571.

The tenant of an estate *pur autre vie*, whether or not it had a special occupant, could dispose of the estate either by alienation in his lifetime or by his will. If he did not dispose of it by will the estate was chargeable in the hands of the heir, if it came to him as special occupant, as assets by descent, as in the case of freehold land

in fee simple; where there was no special occupant the estate, whatever its tenure, and whether a corporeal or incorporeal hereditament, passed to the tenant's executor or administrator, and was assets in his hands to be applied and distributed in the same manner as the personal estate of the testator or intestate: see the Wills Act 1837 ss 3, 6 (repealed).

7 See the Administration of Estates Act 1925 s 1(1); and PARA 363 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(7) DEVOLUTION OF TRUST AND MORTGAGE ESTATES/368. Devolution of personalty held on trust.

(7) DEVOLUTION OF TRUST AND MORTGAGE ESTATES

368. Devolution of personalty held on trust.

Personal estate vested in a sole or a last surviving or continuing trustee devolves upon his personal representatives¹, who have power to appoint new trustees in the place of the deceased trustee, whether he was the last survivor of several trustees or the sole trustee², where there is no person nominated by the instrument creating the trust for the purpose of appointing new trustees, or where there is no person so nominated able and willing to act³.

1 As to the appointment of separate executors for this purpose and the effect of an unlimited grant to general executors in spite of such an appointment see PARA 12 ante.

2 See *Re Shafter's Trusts*(1885) 29 ChD 247. See also the Trustee Act 1925 s 18(2); and TRUSTS vol 48 (2007 Reissue) PARA 828. The personal representative's powers cease on the appointment of new trustees, so that if the personal representative is to continue as one of the trustees he must be re-appointed: see s 36(1); *Re Sampson*[1906] 1 Ch 435.

3 Trustee Act 1925 s 36(1). As to the appointment of new trustees generally, and the court's powers to make a vesting order see TRUSTS vol 48 (2007 Reissue) PARA 835 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(7) DEVOLUTION OF TRUST AND MORTGAGE ESTATES/369. Devolution of realty held on trust.

369. Devolution of realty held on trust.

Real estate and chattels real vested in any person solely on any trust devolve on his death on his personal representative¹, who has the same power of disposing of the realty as if it were a chattel real, and is deemed in law the trustee's heir and assign within the meaning of all trusts and powers².

Since 1881, therefore, the personal representative has accordingly been substituted for the trustee's heir or assign, but at first he had no powers additional to those which the heir or assign formerly had³. Now, however, the proving personal representative of a sole or last surviving or continuing trustee has all the powers of such trustee or other the trustees or trustee for the time being of the trust⁴.

Notwithstanding that the trust estate vests in the personal representative of the sole or last surviving trustee, a power of appointing new trustees can be validly exercised by the person in

whom the power is vested under the trust; and the appointment operates to oust the personal representative from the trust⁵.

1 See the Administration of Estates Act 1925 ss 1(1), 3(1)(ii) (as amended) (see PARAS 363-364 ante) which, as to trust and mortgage estates, replace the repealed Conveyancing Act 1881 s 30. In the absence of a personal representative the legal estate vests in the President of the Family Division (formerly the Probate, Divorce and Admiralty Division) (see PARA 34 ante); but before 1926 real estate held by a sole surviving trustee apparently vested on his death intestate, while no personal representative was constituted, in the heir (see *Re Pilling's Trusts* (1884) 26 ChD 432; and cf para 34 note 1 ante). As to the appointment of separate executors for this purpose and the effect of an unlimited grant to general executors in spite of such appointment see PARA 12 ante.

Before statute provided for the devolution on personal representatives, on the death intestate without heirs of a trustee or mortgagee the estate escheated to the Crown or lord (see *A-G v Duke of Leeds* (1833) 2 My & K 343) unless the lord had admitted the trustee or mortgagee on a surrender which gave him notice of the trust, in which case he was bound by it (*Weaver v Maule* (1830) 2 Russ & M 97).

2 See the Administration of Estates Act 1925 ss 1(2), 2 (as amended); and PARA 363 ante.

3 *Re Ingleby and Boak and Norwich Union Insurance Co* (1883) 13 LR Ir 326; *Re Crunden and Meux's Contract* [1909] 1 Ch 690.

4 See the Trustee Act 1925 s 18(2); and TRUSTS vol 48 (2007 Reissue) PARA 817.

5 *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280. See TRUSTS vol 48 (2007 Reissue) PARA 817 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(7) DEVOLUTION OF TRUST AND MORTGAGE ESTATES/370. Exercise of powers.

370. Exercise of powers.

Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, are capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust¹. The representatives may, however, decline to act in the trusts², and they are under no obligation to appoint new trustees³.

1 Administration of Estates Act 1925 s 1(2); Trustee Act 1925 s 18(2). Cf the Settled Land Act 1925 s 30(3) (see SETTLEMENTS vol 42 (Reissue) PARA 751). The personal representatives only have the powers of a sole surviving trustee. The latter cannot give a receipt for capital money unless a trust corporation, but apparently the Trustee Act 1925 s 18(3) implies that two personal representatives can. Section 18 has been so construed in practice.

2 *Legg v Mackrell* (1860) 2 De GF & J 551; *Re Ridley, Ridley v Ridley* [1904] 2 Ch 774; *Re Benett, Ward v Benett* [1906] 1 Ch 216, CA.

3 *Re Knight's Will* (1884) 26 ChD 82, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(7) DEVOLUTION OF TRUST AND MORTGAGE ESTATES/371. Mortgage estates.

371. Mortgage estates.

Real estate, including chattels real¹, held by way of mortgage by any person solely, devolves upon his personal representatives². They are entitled to receive and give a good discharge for the mortgage money, and may accordingly exercise the statutory power of sale³. In the case of several mortgagees or of several transferees⁴, where the money is expressed to have been advanced on a joint account, the personal representatives of the last survivor may, so far as no intention to the contrary is expressed, give a good discharge for the mortgage money, notwithstanding any notice to the payer of a severance of the joint account⁵, and are, therefore, also in a position to exercise the statutory power of sale.

1 A mortgage can only be effected at law either by a demise or a subdemise for a term of years absolute or by a legal charge: see the Law of Property Act 1925 ss 85, 86; and MORTGAGE vol 77 (2010) PARA 190 et seq.

2 See the Administration of Estates Act 1925 ss 1(1), 3(1) (as amended), replacing the repealed Conveyancing Act 1881 s 30. The case of copyholds before 1925 formed an exception. Where the legal estate was in trustees, the equitable estate descended according to the custom of the manor regulating the descent of the legal estate provided the trusts were executed; but if the trusts were executory, the equitable estate descended according to the general rules of inheritance: *Trash v Wood* (1839) 4 My & Cr 324; applied in *Re Hudson, Cassels v Hudson* [1908] 1 Ch 655 (resulting trust). Trust and mortgage copyhold estates were a for a time (ie from 31 December 1881 to 16 September 1887) within the Conveyancing Act 1881 s 30 (repealed). The former law was restored by the Copyhold Act 1887 s 45 (repealed and re-enacted by the Copyhold Act 1894 s 88), and copyholds devolved again on the customary heir: see *Re Mills' Trusts* (1887) 37 ChD 312; affd without deciding on this point (1888) 40 ChD 14, CA. Under the Administration of Estates Act 1925 ss 1, 3(1)(ii) (as amended), enfranchised copyholds devolved upon the personal representatives. As to land formerly copyhold see REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

As to the appointment of separate executors for trust or mortgage estates and the effect of an unlimited grant to general executors in spite of such appointment see PARA 12 ante.

3 See the Law of Property Act 1925 s 106(1); and MORTGAGE vol 77 (2010) PARA 451 et seq. The statutory power of sale only applies to a case of a mortgage made by deed: see s 101(1); and MORTGAGE.

4 This applies where the mortgage or transfer was executed since 31 December 1881.

5 See the Law of Property Act 1925 s 111; and MORTGAGE vol 77 (2010) PARA 212.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(8) DEVOLUTION OF PROPERTY SUBJECT TO A GENERAL POWER OF APPOINTMENT/372. Real estate.

(8) DEVOLUTION OF PROPERTY SUBJECT TO A GENERAL POWER OF APPOINTMENT

372. Real estate.

Real estate, including chattels real, disposed of by a will which operates as an appointment under a general power to appoint by will or operates under the testamentary power conferred by statute to dispose of an entailed interest¹ is deemed to be the property of the testator which vests in his personal representative².

1 For the statutory power to dispose of an entailed estate by will see the Law of Property Act 1925 s 176; and REAL PROPERTY vol 39(2) (Reissue) PARA 141.

2 See the Administration of Estates Act 1925 ss 1(1), 3(1), (2) (s 3(1) as amended); and PARA 366 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/4. DEVOLUTION ON THE REPRESENTATIVE/(8) DEVOLUTION OF PROPERTY SUBJECT TO A GENERAL POWER OF APPOINTMENT/373. Personal estate.

373. Personal estate.

All property, whether real or personal, disposed of in exercise of a general power of appointment (including the statutory power to dispose of entailed interests) constitutes assets for the payment of debts¹. For inheritance tax purposes, a person who has a general power² which enables him, or would if he were sui juris enable him, to dispose of any property other than settled property, or to charge money on any property other than settled property, is treated as beneficially entitled to the property or money³. The personal representative is, however, the only person entitled to receive personal estate so appointed⁴, and he might give a valid receipt for it to the trustee of the settlement⁵.

References to the estate of a deceased person in the Administration of Estates Act 1925 include property over which the deceased exercises a general power of appointment (including the statutory power to dispose of entailed interest) by will⁶.

1 See PARA 387 post.

2 For these purposes, 'general power' means a power or authority enabling the person by whom it is exercisable to appoint or dispose of property as he thinks fit: Inheritance Tax Act 1984 s 5(2).

3 Ibid s 5(2). For estate duty purposes, personal estate excluding leaseholds, over which a general power of appointment had been exercised, was property which did not pass to the executor as such: *O'Grady v Wilmot* [1916] 2 AC 231 at 250-251, HL. See INHERITANCE TAXATION vol 24 (Reissue) PARA 644.

4 *Re Hoskin's Trusts* (1877) 6 ChD 281, CA; *O'Grady v Wilmot* [1916] 2 AC 231 at 250-251, HL; and see *Re Guedalla, Lee v Guedalla's Trustees* [1905] 2 Ch 331. As to powers generally see POWERS.

5 *Re Hoskin's Trusts* (1877) 6 ChD 281, CA; *O'Grady v Wilmot* [1916] 2 AC 231 at 250-251, HL; *Re Peacock's Settlement, Kelcey v Harrison* [1902] 1 Ch 552 (administrator with will annexed).

6 Administration of Estates Act 1925 s 55(3).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(1) THE REPRESENTATIVE'S FIRST DUTIES/(i) Funeral and Inventory/374. Disposal of the body.

5. THE ADMINISTRATION OF ASSETS

(1) THE REPRESENTATIVE'S FIRST DUTIES

(i) Funeral and Inventory

374. Disposal of the body.

Where a person appoints executors they are *prima facie* entitled to the possession, and are responsible for the disposal, of the dead body¹. The deceased's directions as to the nature of his funeral specifying where burial or cremation is to be carried out are not legally binding².

Where a deceased person in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body be used after his death for therapeutic purposes or for purposes of medical education or research or for anatomical examination any person lawfully in possession of the body may authorise the use of the body or removal of parts for such purposes unless he has reason to believe that the request was subsequently withdrawn³. Any person lawfully in possession of the body may authorise the use of the body or removal of parts for such purposes in the absence of a request if, having made such reasonable inquiry as may be practicable, he has no reason to believe: (1) that the deceased had expressed an objection⁴ to his body being so dealt with after his death, and had not withdrawn it; or (2) that the surviving spouse or any surviving relative of the deceased objects to the body being so dealt with⁵. Where the person lawfully in possession of the body has reason to believe that an inquest or post-mortem examination may be required by the coroner he may not give or act on any such authority except with the consent of the coroner⁶; and a person entrusted with a body for the purpose only of its interment or cremation may not give such authority⁷.

1 See *Dobson v North Tyneside Health Authority*[1996] 4 All ER 474, [1997] 1 FLR 598, CA. As to duties as to burial and as to cremation see CREMATION AND BURIAL. It is a criminal offence to prevent a proper burial: *R v Hunter*[1974] QB 95, [1973] 2 All ER 286, CA. Where a mother and father were in dispute as to the disposal of the ashes of their minor daughter it was held that division of the ashes would not be appropriate and they should be scattered in Nuneaton where the entire family had a focus and not in Wales where the child died: *Fessi v Whitmore*[1999] 1 FLR 767. See also *Buchanan v Milton*[1999] 2 FLR 844 where an application for a discretionary grant of letters of administration under the Supreme Court Act 1981 s 116 (see PARAS 180-181 ante) was made in the course of a dispute as to the disposal of the deceased's body.

2 *Williams v Williams*(1882) 20 ChD 659. See also the Human Tissue Act 1961 s 1(1); the Anatomy Act 1984 s 4(1), (2); and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 226 et seq.

3 Human Tissue Act 1961 s 1(1); Anatomy Act 1984 s 4(1), (2). See also MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 226 et seq.

4 Under the Anatomy Act 1984 the objection must be made by the deceased in writing or, during his last illness, orally in the presence of two or more witnesses: see s 4(3).

5 Human Tissue Act 1961 s 1(2); Anatomy Act s 4(3). See further CREMATION AND BURIAL; MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 226 et seq.

6 Human Tissue Act 1961 s 1(5); Anatomy Act 1984 s 4(5).

7 Human Tissue Act 1961 s 1(6); Anatomy Act 1984 s 4(7).

UPDATE

374 Disposal of the body

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(1) THE REPRESENTATIVE'S FIRST DUTIES/(i) Funeral and Inventory/375. The inventory. .

375. The inventory. .

The personal representatives¹ of a deceased person are under a duty, when required to do so by the court², to exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court³.

Any interest in the estate of a testator or intestate is sufficient to support an application for an inventory⁴, and mere lapse of time is no bar to the right⁵; but the court has a discretion to refuse the application⁶. The duty to exhibit an inventory is not confined to the original representatives, but may be enforced against the representatives of an administrator with the will annexed⁷, or against the executor of one of several executors, even if there is an executor of the original testator still surviving⁸.

Under this statutory jurisdiction the court can only require that the property of which the deceased died possessed should be included in the inventory; it cannot call for an account of the subsequent profits of his business⁹.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 'The court' means the High Court and also the county court where that court has jurisdiction: Administration of Estates Act 1925 s 55(1)(iv) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). See also PARA 256 ante. Only the High Court can require the grant to be delivered up: see the Administration of Estates Act 1925 s 25(c) (as substituted); and PARA 256 ante. The application is by application notice: see PARA 98 ante.

3 Ibid s 25(b) (substituted by the Administration of Estates Act 1971 s 9). As to the long-standing practice, apart from statute, for personal representatives to exhibit an inventory only when required to do so see *Phillips v Bignell* (1811) 1 Phillim 239 at 240 per Sir John Nicholl. See also PARA 801 post.

4 *Myddleton v Rushout* (1797) 1 Phillim 244.

5 *Jickling v Bircham* (1843) 2 Notes of Cases 463; *Scurrah v Scurrah* (1841) 2 Curt 919 at 921.

6 *Burgess v Marriott* (1843) 3 Curt 424 at 426; *Ritchie v Rees and Rees* (1822) 1 Add 144; *Bowles v Harvey* (1832) 4 Hag Ecc 241; *Scurrah v Scurrah* (1841) 2 Curt 919.

7 *Ritchie v Rees and Rees* (1822) 1 Add 144 at 158. As to administration with the will annexed see PARAS 196-200 ante.

8 *Gale v Luttrell* (1824) 2 Add 234.

9 See *Pitt v Woodham* (1828) 1 Hag Ecc 247 at 250.

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376. Entry into the deceased's house.

The representative may enter into the testator's house and remove his personal effects if he can do so without violence¹. The power extends to the case of a deceased tenant for life or tenant in tail².

- 1 Went Off Ex (14th Edn) 202.
- 2 *Stodden v Harvey* (1608) Cro Jac 204.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(1) THE REPRESENTATIVE'S FIRST DUTIES/(ii) Getting in and Investing the Property/377. Getting in the estate.

(ii) Getting in and Investing the Property

377. Getting in the estate.

The personal representatives¹ of a deceased person are under a duty to collect and get in the deceased's real and personal estate² and administer it according to law³. A personal representative should get in as speedily as possible all money of his testator outstanding upon personal security only⁴, and call in any balance due from a co-executor⁵. He is not required, however, to make good the loss if he has done all he can to obtain payment, even though his efforts have not proved successful; and even if he has taken no steps to obtain payment but it appears, or there is reasonable ground for believing, that such steps would have been ineffectual he is exonerated from liability⁶. In such a case the burden of proving the grounds of his belief rests upon him⁷.

In the case of money outstanding on real security, there is no duty upon the personal representatives to realise a mortgage created by the deceased himself where the realisation is not required for any testamentary purpose, and the security itself is not in any peril⁸. Where the security has fallen in value below the two-thirds limit⁹, it is not the personal representatives' absolute duty at once to call in the mortgage, but they have a discretion, which they must exercise as practical persons with due regard to all the circumstances of the case¹⁰. There is no obligation to sell non-income-bearing assets in order to increase sums due under an agreement to pay maintenance on the dissolution of a marriage¹¹.

- 1 For the meaning of 'personal representative' see PARA 4 ante.
- 2 For the meaning of 'real estate' see PARA 3 note 1 ante.
- 3 Administration of Estates Act 1925 s 25(a) (substituted by the Administration of Estates Act 1971 s 9).
- 4 *Lowson v Copeland* (1787) 2 Bro CC 156; *Powell v Evans* (1801) 5 Ves 839; *Tebbs v Carpenter* (1816) 1 Madd 290; *A-G v Higham* (1843) 2 Y & C Ch Cas 634; *Caney v Bond* (1843) 6 Beav 486; *Gardner v Gardner* (1837) 1 Jur 402; *Evans v Flight* (1838) 2 Jur 818.
- 5 *Stiles v Guy* (1849) 1 H & Tw 523.
- 6 *Clack v Holland* (1854) 19 Beav 262 at 271 per Romilly MR; *Re Roberts, Knight v Roberts* (1897) 76 LT 479, CA.
- 7 *Re Brogden, Billing v Brogden* (1888) 38 ChD 546, CA.
- 8 *Re Chapman, Cocks v Chapman* [1896] 2 Ch 763 at 778, CA, per Lopes LJ.
- 9 Ie under the Trustee Act 1925 s 8(1).
- 10 *Re Medland, Eland v Medland* (1889) 41 ChD 476, CA. See also the Trustee Act 1925 s 4. As to the rules on lending money on mortgage see TRUSTS vol 48 (2007 Reissue) PARA 1028 et seq.

11 *Re Korda*(1958) Times, 19 July, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(1) THE REPRESENTATIVE'S FIRST DUTIES/(ii) Getting in and Investing the Property/378. Foreign assets.

378. Foreign assets.

Once administration has been granted, it is the administrator's duty to administer the assets in accordance with the *lex loci* of the assets¹. He must, therefore, get in the assets situated in the country in which the grant was made, pay the deceased's debts and liabilities and distribute the balance to those entitled. An English court may judicially administer English and foreign assets together by acting on the person of the representative².

1 *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA. However, the English courts will not always compel an English administrator to hand the assets to a foreign administrator: *Re Lorillard, Griffiths v Catforth* supra. See also CONFLICT OF LAWS vol 8(3) (Reissue) PARA 432 et seq.

2 *Stirling-Maxwell v Cartwright* (1878) 9 ChD 173; *Ewing v Orr-Ewing* (1883) 9 App Cas 34, HL.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(1) THE REPRESENTATIVE'S FIRST DUTIES/(ii) Getting in and Investing the Property/379. The executor's year.

379. The executor's year.

The general rule is that a year¹ from the date of death is a reasonable time within which a personal representative should realise investments which it is not proper to retain². The rule has been described as a *prima facie* and not a fixed rule³, and where personal representatives acting in the honest exercise of their discretion postpone the sale beyond the end of the first year they will not be liable for any loss occasioned by the postponement⁴.

A direction contained in the will that the executors should sell with all convenient speed does not render it obligatory upon them to sell at any particular time; they are still entitled to exercise a reasonable discretion⁵. Where the will contains such a direction, executors should, however, dispose of shares in an unlimited company as soon as possible⁶. They may be charged with a loss occasioned by their refusing an advantageous offer⁷.

Where executors are given a discretion under the will as to the retention or the postponement of the conversion of existing securities, they are not liable for mere errors of judgment if they act honestly and with ordinary prudence⁸, even though the securities retained are shares in an unlimited company⁹.

1 The executor's year can be viewed from two aspects: (1) whether the executor is under a duty to pay the testator's debts within that time; or (2) whether the executor is under a duty to get in assets and realise unauthorised investments within that time. As regards the former aspect, there is no rule of law that it is the executor's duty to pay the testator's debts within a year from his death: see PARA 384 text and note 7 post. As to the latter aspect of the executor's year see *infra*.

2 *Hiddingh (Heirs) v De Villiers Denyssen, Hiddingh v Denyssen, Denyssen v Hiddingh* (1887) 12 App Cas 624 at 631, PC. As to the power to postpone distribution see the Administration of Estates Act 1925 s 44; and PARA 476 post.

3 *Grayburn v Clarkson* (1868) 3 Ch App 605 at 606 per Page Wood LJ. See also *Hughes v Empson* (1856) 22 Beav 181.

4 *Buxton v Buxton* (1835) 1 My & Cr 80; *Marsden v Kent* (1877) 5 ChD 598, CA; *Re Chapman, Cocks v Chapman* [1896] 2 Ch 763 at 782, CA, per Rigby LJ.

5 *Grayburn v Clarkson* (1868) 3 Ch App 605 at 608 per Selwyn LJ.

6 *Grayburn v Clarkson* (1868) 3 Ch App 605; *Sculthorpe v Tipper* (1871) LR 13 Eq 232.

7 *Taylor v Tabrum* (1833) 6 Sim 281; *Fry v Fry* (1859) 27 Beav 144.

8 *Re Chapman, Cocks v Chapman* (1896) 2 Ch 763, CA; *Re Smith, Smith v Thompson* [1896] 1 Ch 71. As to the rights as between tenant for life and remainderman in respect of wasting or reversionary property see PARA 540 et seq post.

9 *Re Norrington, Brindley v Partridge* (1879) 13 ChD 654, CA.

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380. Investment of cash.

Where the executor is not directed by the will to invest his testator's money he incurs no liability by leaving it in the bank¹, but he must keep it in a separate account and not mix it with other money². Where he is under an obligation to invest he must not allow money to remain at the bank for an unnecessarily long period³, although he may leave a considerable sum there for the purposes of administration⁴, or until an investment is found⁵. If he leaves money with his bank to be invested he should see that the investment is made⁶.

1 *Johnson v Newton* (1853) 11 Hare 160; *Re Marcon's Estate, Finch v Marcon* (1871) 40 LJ Ch 537. Where, however, the executor is a bank the question whether the executor is liable to pay interest on money deposited with itself may depend on the charging clause in the will being such as to exclude that liability: see *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054. In this connection it may be material whether the corporate executor is the same legal person as the bank.

2 *Wilks v Groom* (1856) 25 LJ Ch 724 at 729 per Kindersley V-C. As to the liability to account for profits made out of estate money and the duty to act gratuitously see PARA 38 et seq ante.

3 *Moyle v Moyle* (1831) 2 Russ & M 710; *Fletcher v Walker* (1818) 3 Madd 73.

4 *Dawson v Massey* (1809) 1 Ball & B 219 at 231; *Swinfen v Swinfen (No 5)* (1860) 29 Beav 211.

5 *Fenwick v Clarke* (1862) 4 De GF & J 240. As to trust investments generally see TRUSTS vol 48 (2007 Reissue) PARA 1005 et seq.

6 *Challen v Shippam* (1845) 4 Hare 555.

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381. Lending money on personal security.

In the absence of express authority the representatives ought not to lend on personal security¹, even if given by several persons². Even where there is authority to lend on personal security, representatives ought not to lend to one of themselves³; nor, without authority, should they lend upon second⁴ or contributory mortgages⁵.

1 *Walker v Symonds* (1818) 3 Swan 1 at 63. As to powers to lend on personal security see also TRUSTS vol 48 (2007 Reissue) PARA 1010.

2 *Holmes v Dring* (1788) 2 Cox Eq Cas 1.

3 --v *Walker* (1828) 5 Russ 7; *Stickney v Sewell* (1835) 1 My & Cr 8.

4 *Norris v Wright* (1851) 14 Beav 291 at 308; *Drosier v Brereton* (1851) 15 Beav 221 at 226; *Lockhart v Reilly* (1857) 1 De G & J 464 at 476; *Re Roberson, Campkin v Barton* [1883] WN 110.

5 *Webb v Jonas* (1888) 39 ChD 660. As to trust investments generally see TRUSTS vol 48 (2007 Reissue) PARA 1005 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(1) THE REPRESENTATIVE'S FIRST DUTIES/(iii) Notices for Claims/382. Issue of advertisements.

(iii) Notices for Claims

382. Issue of advertisements.

In order to safeguard himself a personal representative should issue advertisements requiring any person interested to send him within the time, not being less than two months, fixed in the notice particulars of his claim¹ in respect of the property to which the notice relates². The advertisement should be inserted in the London Gazette, and, as regards land, in a newspaper circulating in the district in which the land is situated³; but there is no absolute rule requiring it to be inserted in any other London newspaper, that must depend upon the circumstances of each case⁴. Where the deceased's residence was outside London an advertisement should be inserted in a newspaper in the neighbourhood⁵. In the absence of special circumstances there is no reason why the advertisement should be inserted more than once⁶.

Where advertisement is impossible the court may give leave to distribute upon the footing that all the debts and liabilities of the estate have been ascertained. Such leave only operates to protect the personal representative, and does not prevent the missing beneficiary or absent creditor from following the assets⁷.

Where a beneficiary is presumed dead, it is open to the personal representative to take out missing beneficiary insurance as an alternative to bringing proceedings before the court, notwithstanding that the personal representative is a beneficiary of the estate⁸.

1 The words 'claims against the estate', which are commonly used in such advertisements, have been held to include the claims of persons beneficially interested under the will or intestacy as well as the claims of creditors (*Newton v Sherry* (1876) 1 CPD 246), but such a form of words is misleading and advertisements ought to follow more closely the wording of the Trustee Act 1925 s 27 (as amended): *Re Aldhous, Noble v Treasury Solicitor* [1955] 2 All ER 80, [1955] 1 WLR 459. The Lord Chancellor's Office, in consultation with the Law Society, has arranged that, in certain newspapers, advertisements by personal representatives will be inserted in the form of a schedule under a common heading, in order to save space and expense and avoid repetition of formal words: see [1948] WN Misc 47.

2 See the Trustee Act 1925 s 27(1) (amended by the Law of Property (Amendment) Act 1926 ss 7, 8(2), Schedule; and the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(7)); and TRUSTS vol 48 (2007 Reissue) PARA 915. As to the time within which personal representatives should advertise see *Re Kay, Mosley v Kay* [1897] 2 Ch 518. The Trustee Act 1925 s 27 (as amended) applies notwithstanding anything to the contrary in the will: s 27(3).

3 See *ibid* s 27(1) (as amended: see note 2 *supra*). See also *R v Westminster Betting and Licensing Committee, ex p Peabody Donation Fund* [1963] 2 QB 750, sub nom *R v Westminster Betting and Licensing Committee, ex p Peabody Donation Fund (Governors)* [1963] 2 All ER 544.

4 *Re Bracken, Doughty v Townson* (1889) 43 ChD 1 at 9, CA, per Cotton LJ.

5 *Wood v Weightman* (1872) LR 13 Eq 434.

6 *Re Bracken, Doughty v Townson* (1889) 43 ChD 1 at 7, CA, per North J.

7 *Re Gess, Gess v Royal Exchange Assurance* [1942] Ch 37. See also PARA 524 post. As to the following of property see PARA 514 et seq post.

8 *Re Evans, Evans v Westcombe* [1999] 2 All ER 777.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(1) THE REPRESENTATIVE'S FIRST DUTIES/(iii) Notices for Claims/383. Effect of advertising.

383. Effect of advertising.

After the time specified in the advertisement for sending in claims¹ the personal representative is at liberty to distribute the assets, having regard to those claims of which he has notice, but he is under no liability in respect of those assets to any person of whose claim he has had no notice whatever². He is entitled to the same protection as if he had administered the estate under a judgment of the court³, but the property distributed or any property representing it may be followed into the hands of any person other than a purchaser who may have received it⁴. He is not, however, free from liabilities of which he has notice, even though no claim in respect of them has been sent in answer to his advertisement⁵; nor is he free from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain⁶.

1 The representative must give not less than two months' notice from the date of the last notice, where more than one notice is given: see the Trustee Act 1925 s 27(1) (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 915. It is usual to give rather longer than two months' notice, as the appearance of the advertisement may be delayed.

2 See *ibid* s 27(2); and TRUSTS vol 48 (2007 Reissue) PARA 915. See also *Re Burke, King v Terry* (1919) 54 LJo 430. In special circumstances an inquiry will be directed as to what advertisements are necessary to enable the personal representatives to obtain the protection of this provision: *Re Letherbrow, Hopp v Dean* [1935] WN 34 at 48; *Re Holden, Isaacson v Holden* [1935] WN 52.

3 *Clegg v Rowland* (1866) LR 3 Eq 368.

4 See the Trustee Act 1925 s 27(2)(a); and TRUSTS vol 48 (2007 Reissue) PARA 915. As to the effect of this provision see PARA 524 post; and as to following assets see PARA 514 et seq post.

5 *Re Land Credit Co of Ireland, Markwell's Case* (1872) 21 WR 135; *Guardian Trust and Executors Co of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115, [1942] 1 All ER 598, PC (executor not entitled to disregard notice of claim because he believed it to be invalid).

6 See the Trustee Act 1925 s 27(2)(b); and TRUSTS vol 48 (2007 Reissue) PARA 915. As to the searches which an intending purchase should make see SALE OF LAND vol 42 (Reissue) PARA 19 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(2) PAYMENT OF DEBTS PRESENTLY DUE/(i) Solvent Estates/384. Duty to pay debts.

(2) PAYMENT OF DEBTS PRESENTLY DUE

(i) Solvent Estates

384. Duty to pay debts.

Apart from any provisions contained in the will of a testator which expressly or impliedly deal with the payment of debts, it is the duty of the personal representatives, as a matter of the due administration of a solvent¹ estate, to pay their testator's debts, including unpaid income tax², capital gains tax³, and inheritance tax⁴, with due diligence having regard to the assets in their hands properly applicable for that purpose.

In determining whether due diligence has been shown regard must be had to all the circumstances of the case⁵. This duty is owed not only to creditors but also to beneficiaries, whether or not the debt bears interest⁶. There is no rule of law that the debts must be paid within a year from the testator's death, but due diligence must be shown, and if debts are not paid within the year the onus is thrown on the personal representatives to justify the delay⁷.

1 As to insolvent estates see PARA 399 post. It seems that where there is serious doubt about the solvency of the estate administration should proceed on the basis of insolvency: cf *George Lee & Sons (Builders) Ltd v Olink*[1972] 1 All ER 359, [1972] 1 WLR 214, CA.

2 As to the liability of personal representatives for unpaid income tax see the Taxes Management Act 1970 s 74; and INCOME TAXATION vol 23(2) (Reissue) PARA 1246. As to the effect of a trust to pay debts see PARA 398 post.

3 No chargeable gain arises on death: see the Taxation of Chargeable Gains Act 1992 s 62(1); and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 106. The personal representatives are, however, liable for capital gains tax incurred before death where the liability has not been settled by the deceased before his death.

4 See the Inheritance Tax Act 1984; and INHERITANCE TAXATION vol 24 (Reissue) PARA 636. As to the Inland Revenue affidavit or account see PARA 131 ante. As to the personal representatives' liabilities for inheritance tax see PARAS 766, 802 post.

5 *Re Tankard, Tankard v Midland Bank Executor and Trustee Co Ltd*[1942] Ch 69 at 72, [1941] 3 All ER 458 at 463 per Uthwatt J.

6 *Re Tankard, Tankard v Midland Bank Executor and Trustee Co Ltd*[1942] Ch 69 at 72, [1941] 3 All ER 458 at 463 per Uthwatt J. See also *Hall v Hallet* (1784) 1 Cox Eq Cas 134.

7 *Re Tankard, Tankard v Midland Bank Executor and Trustee Co Ltd* [1942] Ch 69 at 74, [1941] 3 All ER 458 at 464 per Uthwatt J, explaining and approving *Grayburn v Clarkson* (1868) 3 Ch App 605. As to the executor's year see PARA 379 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(2) PAYMENT OF DEBTS PRESENTLY DUE/(i) Solvent Estates/385. Debt payable in foreign currency.

385. Debt payable in foreign currency.

An English court may give judgment for a sum of money expressed in foreign currency or the sterling equivalent at some determinable¹ date where there is a contractual obligation to pay in foreign currency under a contract the proper law of which is that of a foreign country or of England² and where the money of account and payment is that of that country or possibly of some other country but not of the United Kingdom³. The date of any conversion into sterling is in general the date of payment or enforcement, but in bankruptcy and liquidation the date of admission of proof is taken⁴. It has been held that in administration proceedings the date of the administration order is to be taken as the date of conversion⁵, but this decision may need reconsideration in the light of later authority⁶.

1 See the text to notes 4-5 infra.

2 *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900.

3 *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 at 813, [1975] 3 WLR 758 at 771, HL, per Lord Wilberforce. See further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1302.

4 *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 at 814, [1975] 3 WLR 758 at 772, HL, per Lord Wilberforce, at 838 and 799 per Lord Cross of Chelsea, and at 841 and 802 per Lord Fraser of Tullybelton.

5 *Re Hawkins, Hawkins v Hawkins* [1972] Ch 714 at 723, [1972] 3 All ER 386 at 394 per Megarry J.

6 See the text to note 3 supra. It would be logical to apply the same test (admission of proof) in administration proceedings where the administration order is analogous to a receiving or winding-up order.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(2) PAYMENT OF DEBTS PRESENTLY DUE/(i) Solvent Estates/386. Foreign assets; equality of payment.

386. Foreign assets; equality of payment.

In the administration of assets in England a creditor of whatever nationality is entitled to be paid equally with English creditors in the same class¹, although in a case in which the foreign assets were distributed so as to give the foreign creditors, as such, priority, the court would, in distributing the English assets, be astute to equalise the payments, and take care that no foreign creditor should come in and receive anything until the English creditors had been paid a proportionate amount². Where there are creditors whose claims are statute barred by English law but still enforceable according to the law of the deceased's domicile the English court may, in the exercise of its discretion, refuse to order the payment of any balance left after the

discharge of debts enforceable in England to the administrator in the country of the domicile, and may itself undertake the distribution of the balance to the persons beneficially entitled³.

1 *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175 (reviewing *Cook v Gregson* (1854) 2 Drew 286); *Eames v Hacon* (1881) 18 ChD 347, CA; *Blackwood v R* (1882) 8 App Cas 82, PC.

2 *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175 at 177.

3 *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(2) PAYMENT OF DEBTS PRESENTLY DUE/(i) Solvent Estates/387. Assets properly applicable for payment of debts.

387. Assets properly applicable for payment of debts.

A deceased¹ person's legal and equitable² real and personal estate³, to the extent of his beneficial interest in it, and the real and personal estate of which he disposes by will⁴ in pursuance of any general power (including the statutory power to dispose of entailed interests⁵), are assets for payment of his debts (whether by specialty or simple contract) and liabilities⁶. Any disposition⁷ by will inconsistent with this rule is void as against the creditors, and the court must, if necessary, administer the property for the purpose of the payment of the debts and liabilities; but this rule takes effect without prejudice to the rights of incumbrancers⁸. If a creditor desires administration of the estate by the court it is not necessary for him to sue on behalf of other creditors as well as on his own behalf⁹.

The testator cannot by his will create a charge as against his general creditors upon the fund in favour of a particular creditor¹⁰, although he may have contracted to do so.

1 This applies to persons dying after 1925.

2 'Legal estates' mean the estates, charges and interests in or over land (subsisting or created at law) which are by statute authorised to subsist or to be created at law; and 'equitable interests' mean all other interests and charges in or over land: Administration of Estates Act 1925 s 55(1)(vii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). For practical purposes legal estates may be considered to consist of the fee simple, the term of years absolute and perpetual rentcharges.

3 For the meaning of 'real estate' see PARA 3 note 1 ante.

4 For the meaning of 'will' see PARA 3 note 1 ante.

5 See PARA 372 note 1 ante.

6 Administration of Estates Act 1925 s 32(1). As to the liability for debts of property forming the subject of a donatio mortis causa see eg *Tate v Leithhead* (1854) Kay 658 at 659; and GIFTS vol 52 (2009) PARA 271 et seq. The deceased's severable share under a joint tenancy is not available for the payment of his debts, even if an order for insolvent administration of his estate is made: see PARA 406 note 6 post.

7 'Disposition' includes a conveyance and also a devise, bequest and an appointment of property contained in a will, and 'dispose of' has a corresponding meaning: Administration of Estates Act 1925 s 55(1)(iii). For the meaning of 'conveyance' see PARA 267 note 1 ante.

8 Ibid s 32(1).

9 *Re James, James v Jones* [1911] 2 Ch 348.

10 *Beyfus v Lawley* [1903] AC 411, HL.

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388. Creditor's statutory rights against beneficiary.

In addition to the right considered above¹ the creditor has certain statutory rights against a beneficiary of his debtor's real or personal estate.

If any person to whom any beneficial interest in the real or personal estate² devolves or is given, or in whom any such interest vests, disposes of it in good faith before an action is brought or process is sued out against him, he is personally liable for the value of the interest so disposed of by him, but the interest is not liable to be taken in execution in the action or under the process³. Accordingly, the property cannot be followed⁴ into the hands of a purchaser for value in good faith, even though he had notice of the existence of the debt⁵. However, an assent, or conveyance⁶ by a personal representative⁷ to a person other than a purchaser⁸ does not prejudice the rights of any person to follow the property to which the assent or conveyance relates, or any property representing it, into the hands of the person in whom it is vested by the assent or conveyance, or of any other person, not being a purchaser, who may have received it or in whom it may be vested⁹.

Notwithstanding any such assent or conveyance the court¹⁰ may, on the application of any creditor or other person interested¹¹:

- (1) order a sale, exchange, mortgage, charge, lease, payment, transfer or other transaction to be carried out which the court considers requisite for the purpose of giving effect to the rights of the persons interested¹²;
- (2) declare that the person, not being such a purchaser as is mentioned above, in whom the property is vested is a trustee for those purposes¹³;
- (3) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order¹⁴; or
- (4) make any vesting order, or appoint a person to convey in accordance with the statutory provisions¹⁵ to that effect¹⁶.

1 See PARA 387 ante.

2 For the meaning of 'real estate' see PARA 3 note 1 ante.

3 Administration of Estates Act 1925 s 32(2). Since the enactment of the CPR, an action is now known as a claim: see PARA 37 note 3 ante.

4 As to following property see PARA 514 et seq post.

5 *Jones v Noyes and Allen* (1858) 28 LJ Ch 47.

6 For the meaning of 'conveyance' see PARA 267 note 1 ante. As to assents see PARA 559 et seq post.

7 For the meaning of 'personal representative' see PARA 4 ante.

8 For the meaning of 'purchaser' see PARA 267 note 4 ante.

9 Administration of Estates Act 1925 s 38(1). It has been held, under the Debts Recovery Act 1830 (repealed except as to deaths before 1926), that a conveyance in good faith for value by an equitable tenant for

life protected the interest from creditors: see *Re Atkinson, Proctor v Atkinson* [1908] 2 Ch 307, CA, adopting dictum of Lord Chelmsford LC in *Coope v Cresswell* (1866) 2 Ch App 112 at 122, and applying *British Mutual Investment Co v Smart* (1875) 10 Ch App 567, and *Re Hedgely, Small v Hedgely* (1886) 34 ChD 379.

10 The county court has jurisdiction where the estate does not exceed in amount or value the county court limit: Administration of Estates Act 1925 ss 38(4), 55(1)(iiiA) (both added by the County Courts Act 1984 s 148(1), Sch 2 Pt III paras 12, 15). As to the county court limit see PARA 275 note 3 ante. Where the estate exceeds the limit the county court can be given jurisdiction by agreement: see the County Courts Act 1984 s 24(2)(d); and COURTS.

11 Administration of Estates Act 1925 s 38(2). Section 38 (as amended) does not prejudice the rights of a purchaser or person deriving title under him, and applies whether the testator or intestate died before or after 1 January 1926: s 38(3). See also *Re Illidge, Davidsons v Illidge* (1884) 27 ChD 478 at 482, CA, per Cotton LJ; *Worthington & Co Ltd v Abbott* [1910] 1 Ch 588.

12 Administration of Estates Act 1925 s 38(2)(a).

13 Ibid s 38(2)(b).

14 Ibid s 38(2)(c).

15 le under the Trustee Act 1925 ss 44-56 (ss 51, 55 as amended; s 54 as substituted and amended) (see TRUSTS vol 48 (2007 Reissue) PARA 875 et seq): see the Administration of Estates Act 1925 s 38(2)(d).

16 Ibid s 38(2)(d).

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389. Effect of registration of administration action.

The registration by the creditor as a pending action¹ of an action for administration sufficiently indicating the real estate sought to be charged is sufficient, before final judgment, to entitle the creditor to priority over a purchaser or mortgagee from any defendant entitled to real estate under the will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose that he is selling or mortgaging for the purpose of paying the testator's debts².

1 As to the registration of pending actions see the Land Charges Act 1972 s 5 (as amended); the Land Registration Act 1925 s 59 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 647 et seq; LAND REGISTRATION vol 26 (2004 Reissue) PARA 861 et seq.

2 *Price v Price* (1887) 35 ChD 297.

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390. Effect of registration of judgment.

A judgment entered up against the devisee or person entitled on intestacy of the deceased for the devisee's or successor's personal debts does not defeat the rights of the deceased's

creditors against the land devised or descended¹, and the devisee or successor takes no beneficial interest in it except subject to and after payment of the deceased's debts².

1 *Kinderley v Jervis* (1856) 22 Beav 1.

2 *Kinderley v Jervis* (1856) 22 Beav 1. See also the Administration of Estates Act 1925 ss 32(1) (see PARA 387 ante), 33(2) (as amended) (see PARA 555 post).

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391. Statutory preferences.

There are certain statutory preferences which extend to all the assets, and have priority over all other debts. The preference of these claims is not affected by the fact that the estate may be in course of administration under the bankruptcy laws¹.

The personal representatives of an officer of a registered friendly society or branch, having in his possession by virtue of his office² any money or property belonging to the society or branch, must, on his death, upon demand, pay the money and deliver over the property to the trustees of the society or branch in preference to any other debt or claim against the estate³. It is immaterial that the money of the society cannot be specifically traced⁴.

Where a voluntary arrangement⁵ has been succeeded by the bankruptcy of the debtor on the petition of the supervisor or a person bound by the voluntary arrangement, any expenses properly incurred as expenses of the administration of the voluntary arrangement are a first charge on the debtor's estate⁶.

1 See the Insolvency Act 1986 s 328(2); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 577. It is not clear whether these categories of debt have preference over the funeral and testamentary expenses; these are now only given express preference over the preferential debts set out in s 386, Sch 6 (both as amended) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 577 et seq): see PARA 399 post.

2 To ensure preference, the receipt must have been strictly by virtue of his office: *Re Jardine, ex p Fleet* (1850) 4 De G & Sm 52; *Re Aberdeen* (1896) 13 TLR 7. The preference applies even though the deceased had ceased to be an officer of the society or branch before the date of his death: *Re Eilbeck, ex p Good Intent Lodge No 987 of the Grand United Order of Oddfellows Trustees* [1910] 1 KB 136.

3 See the Friendly Societies Act 1974 s 59(1)(a), (2); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2175.

4 *Moors v Marriott* (1878) 7 ChD 543; *Re Atkins, ex p Edmonds* (1882) 46 LT 240; *Re Miller, ex p Official Receiver* [1893] 1 QB 327.

5 As to voluntary arrangements see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 81 et seq.

6 See the Insolvency Act 1986 s 276(2); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 575.

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392. Statute-barred debts.

A personal representative has a right to pay a debt barred by the Limitation Act 1980¹, but he may not pay such a debt after it has been judicially declared by a court of competent jurisdiction to be so barred², or if the estate is insolvent³.

After an order has been made for the administration of the estate, any creditor or legatee has the right to set up the statute, notwithstanding the representative's refusal to do so, against a creditor who comes in under the order to prove his debt⁴, but not against the claimant in a creditor's administration claim⁵.

Where none of the parties wishes to set up the statute, the court will not set it up on behalf of an absent beneficiary⁶. Where a claim form has been issued by the executors for the determination, without administration of the estate, of the question whether a defendant is a creditor⁷, the parties must be treated as standing in the same position as if an administration order had been made, and the residuary legatee is accordingly entitled to insist upon the statute being set up⁸.

The right of one of several representatives to pay a statute-barred debt against the wishes of his co-representatives has never been judicially determined⁹.

1 See *Stahlschmidt v Lett* (1853) 1 Sm & G 415; *Hill v Walker* (1858) 4 K & J 166, disapproving of a dictum of Bayley J in *M'Culloch v Dawes* (1826) 9 Dow & Ry KB 40 at 43; and cf *Re Carey, Carey v Carey* (1915) 49 ILT 226. See generally LIMITATION PERIODS.

2 *Re Midgley, Midgley v Midgley* [1893] 3 Ch 282, CA.

3 Statute-barred debts are not provable in an insolvency (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 502), and the insolvency rules apply to the administration of an insolvent estate: see PARA 399 post.

4 *Shewen v Vanderhorst* (1831) 1 Russ & M 347; *Moodie v Bannister* (1859) 4 Drew 432.

5 See *Briggs v Wilson* (1854) 5 De GM & G 12; *Fuller v Redman (No 2)* (1859) 26 Beav 614.

6 *Re Alston, Alston v Trollope* (1866) LR 2 Eq 205.

7 Ie under CPR Sch 1 RSC Ord 85 r 2(2)(c). As to the CPR see PARA 37 note 3 ante.

8 *Re Wenham, Hunt v Wenham* [1892] 3 Ch 59. See also *Re Turner, Klaffenberger v Groombridge* [1917] 1 Ch 422.

9 See *Re Midgley, Midgley v Midgley* [1893] 3 Ch 282 at 297, CA, where Lindley LJ expressed his opinion that it was the law that a representative might pay such a debt with knowledge that his co-representative objected to the payment; the point was, however, left open at 301 per Lopes LJ. See also *Astbury v Astbury* [1898] 2 Ch 111 at 115 per Stirling J. As to joint representation see PARA 345 ante.

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393. Debts barred by the Statute of Frauds.

The right to pay a debt barred by the Limitation Act 1980¹ is an exception to the general rule that it is a devastavit for a representative to pay that which need not be paid, and is not to be extended to a debt to which the Statute of Frauds² affords a good defence³.

1 See PARA 392 ante; and LIMITATION PERIODS.

2 In the Statute of Frauds (1677) s 4 (as amended) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052 et seq), which renders certain contracts unenforceable unless evidenced by a memorandum in writing. Section 4 has been in part repealed by the Law Reform (Enforcement of Contracts) Act 1954, and now applies only to a promise to answer for the debt, default or miscarriage of another. As to what constitutes such a promise see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052.

3 *Re Rownson, Field v White* (1885) 29 ChD 358, CA. In this case *Re Garratt's Trust* (1870) 18 WR 684, to the contrary effect, was not cited. As to liability on a devastavit see PARA 792 et seq post.

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394. Acknowledgment.

The inclusion of a debt by the representative in the account for probate is not a sufficient acknowledgment to take the debt out of the operation of the Limitation Act 1980¹.

Where a partner is executor of his late partner and makes payments of principal or interest on account of a partnership debt, these payments will, in the absence of proof to the contrary, be taken to have no reference to his executorial character, and will not keep the debt alive against his testator's estate².

If a claim is brought by the creditor against two representatives, and one admits the debt while the other pleads the statute, the court accepts the latter's plea as being most for the benefit of the estate³. An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person or to any share or interest in it binds the estate of the deceased person⁴. An acknowledgment of a debt by a person binds his personal representatives and any other person on whom the liability devolves⁵.

1 See *Re Beavan, Davies, Banks & Co v Beavan* [1912] 1 Ch 196 (followed in *Lloyd v Coote and Ball* [1915] 1 KB 242; *Bowring-Hanbury's Trustee v Bowring-Hanbury* [1943] Ch 104, [1943] 1 All ER 48, CA), not following *Smith v Poole* (1841) 12 Sim 17 (inclusion in an inventory exhibited in the probate court held to be sufficient acknowledgment), and questioning *Re Emmett, Jenkins v Emmett* (1906) 95 LT 755 (inclusion in Inland Revenue affidavit held to be sufficient acknowledgment). In *Spollan v Magan* (1851) 1 ICLR 691 at 700, inclusion in an account filed in administration proceedings in Chancery was held to be sufficient acknowledgment; and see *Read v Price* [1909] 1 KB 577; affd [1909] 2 KB 724, CA. For formal provisions as to acknowledgments see the Limitation Act 1980 s 30; and LIMITATION PERIODS vol 68 (2008) PARA 1185.

2 *Thompson v Waithman* (1856) 3 Drew 628; *Brown v Gordon* (1852) 16 Beav 302; *Re Tucker, Tucker v Tucker* [1894] 3 Ch 429, CA.

3 *Chaffe v Kelland* (1637) 1 Roll Abr 929; *Re Midgley, Midgley v Midgley* [1893] 3 Ch 282 at 302, CA, per Lopes LJ.

4 See the Limitation Act 1980 s 31(8); and LIMITATION PERIODS vol 68 (2008) PARA 1216. For the earlier case law see *Atkins v Tredgold* (1823) 2 B & C 23; *M'Culloch v Dawes* (1826) 9 Dow & Ry KB 40; *Tullock v Dunn* (1826) Ry & M 416; *Scholey v Walton* (1844) 12 M & W 510; *Re Macdonald, Dick v Fraser* [1897] 2 Ch 181. As to joint representation see also PARA 345 ante.

5 See the Limitation Act 1980 s 31(6), (9); and LIMITATION PERIODS vol 68 (2008) PARA 1214.

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395. Part payment.

Part payment of principal or interest differs in effect from an acknowledgment or promise, as such payment enures to the benefit of all persons liable to the debt, while the effect of an acknowledgment is confined to the person who makes it¹.

At common law a personal representative does not either by his acknowledgment or promise to pay or by part payment of principal or interest render his co-representative personally chargeable with the debt; and the latter will not be liable for a devastavit if, without knowledge of the debt having been kept alive, he pays away the assets²; but by statute an acknowledgment or payment by one of several personal representatives in respect of any claim to the personal estate of a deceased person binds the estate³.

1 *Coope v Cresswell* (1866) 2 Ch App 112 at 124 per Lord Chelmsford LC. As to acknowledgment see PARA 394 ante.

2 *Re Macdonald, Dick v Fraser* [1897] 2 Ch 181 at 188 per Stirling J; *Re Hollingshead, Hollingshead v Webster* (1888) 37 ChD 651 at 658 per Chitty J. As to liability on a devastavit see PARA 792 et seq post.

3 See the Limitation Act 1980 s 31(8); and LIMITATION PERIODS vol 68 (2008) PARA 1216.

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396. When time runs against a creditor.

Time runs against a creditor whose cause of action accrued during the life of the deceased debtor, even though administration to the estate has not been taken out, and there has been no personal representative who can be sued¹. As there can be no complete cause of action, however, until there is somebody who can be sued², time does not begin to run against a creditor whose debt becomes due after the debtor's death until administration has been taken out to his estate³, or until the executor before obtaining probate, has so meddled with the estate as to render himself liable to be sued for the debts owing by the estate⁴.

1 *Boatwright v Boatwright* (1873) LR 17 Eq 71. An acknowledgment by the deceased may bind persons other than his personal representatives: see the Limitation Act 1980 s 31; and LIMITATION PERIODS vol 68 (2008) PARA 1210 et seq.

2 *Douglas v Forrest* (1828) 4 Bing 686 at 704 per Best CJ.

3 See *Jolliffe v Pitt* (1715) 2 Vern 694.

4 See *Webster v Webster* (1804) 10 Ves 93; *Flood v Patterson* (1861) 29 Beav 295. As to the right to sue an executor who has acted before obtaining probate see *Re Lovett*, *Ambler v Lindsay* (1876) 3 ChD 198. As to a claim based on a devastavit see PARA 792 et seq post.

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397. Charge for payment of debts.

Before 1926 a charge by a testator of debts upon his personal estate did not affect the running of time¹, but a charge by a testator of debts upon realty, or a blended fund of real and personal estate, enlarged the period of limitation to 12 years where the testator had left real estate². Since 1925 personal and real estate are equally applicable for payment of debts³. On the other hand, since 1939 there has been a 12 year limitation period for debts charged on personalty as well as ones charged on realty⁴.

1 This was because the charge was nugatory, the debts being payable out of personalty anyway: *Scott v Jones* (1838) 4 Cl & Fin 382, HL. See also *Re Hepburn, ex p Smith* (1884) 14 QBD 394.

2 *Re Stephens, Warburton v Stephens* (1889) 43 ChD 39; *Re Raggi, Brass v H Young & Co Ltd* [1913] 2 Ch 206.

3 See PARAS 387 ante, 416 post. Accordingly it could be argued that where a charge of debts on realty or a mixed fund makes no difference to the order of applications of assets to pay debts, the limitation period may be unaffected (see notes 1-2 supra). The Land Transfer Act 1897 made real estate subject to the payment of debts, but it was held that an express charge of debts on real estate by a testator dying after it came into force still extended the limitation period: *Re Balls, Trewby v Balls* [1909] 1 Ch 791. See also LIMITATION PERIODS vol 68 (2008) PARA 1105 et seq. The Administration of Estates Act 1925 s 32 (see PARA 387 ante) in providing that the real and personal estate of a deceased person are assets for the payment of debts does not impose a charge: see *Re Moon, Holmes v Holmes* [1907] 2 Ch 304; *Re Welch, Mitchell v Willders* [1916] 1 Ch 375.

4 See the Limitation Act 1980 s 20(1) (see LIMITATION PERIODS vol 68 (2008) PARA 1105), which applies to money charged on pure personalty as well as money charged on realty.

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398. Trust for payment of debts.

If a testator creates an express trust for payment of his debts the creditors, as beneficiaries, may be in a more advantageous position than mere creditors¹.

If there is a devise in trust for payment of debts generally, this does not revive a debt which had become barred before the testator's death².

1 See the Limitation Act 1980 s 21, under which the limitation period is only six years; but no period applies in the case of any fraud or fraudulent breach of trust to which the trustee was a party or privy or to the recovery of trust property from the trustee: see LIMITATION PERIODS vol 68 (2008) PARA 1140. It seems that the

words imposing the trust might also create a charge within s 20(1): see PARA 397 ante; and LIMITATION PERIODS vol 68 (2008) PARA 1105.

2 *Burke v Jones* (1813) 2 Ves & B 275.

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(ii) Insolvent Estates

399. Application of bankruptcy rules.

If the estate of a deceased person is insolvent, and being administered otherwise than in bankruptcy¹, then, subject to the payment of reasonable funeral², testamentary and administration expenses³, which have priority over the preferential debts⁴, and payment of the statutory preferences⁵, the same provisions⁶ as may be in force for the time being under the law of bankruptcy with respect to the assets of individuals adjudged bankrupt apply to the administration of the estate with respect to the respective rights of secured and unsecured creditors⁷, to debts and liabilities provable⁸, to the valuation of future and contingent liabilities⁹, and to the priorities¹⁰ of debts and other payments¹¹.

Certain specified provisions of the Insolvency Act 1986¹² apply, with modifications¹³, to the insolvent estates of deceased persons dying before presentation of a bankruptcy petition¹⁴.

If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter, unless the court otherwise orders, continue as if he were alive¹⁵. The reasonable funeral and testamentary expenses have priority over the preferential debts¹⁶. If a debtor dies after presentation of a bankruptcy petition but before service, the court may order service to be effected on his personal representatives or such other person as it thinks fit¹⁷.

1 As to the administration in bankruptcy of the insolvent estate of a deceased person under an insolvency administration order see the Insolvency Act 1986 s 421; the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 823 et seq. For the purposes of Insolvency Act 1986 s 421, the estate of a deceased person is insolvent if, when realised, it will be insufficient to meet in full all the debts and other liabilities to which it is subject: s 421(4).

2 As to the meaning of 'funeral expenses' see CREMATION AND BURIAL.

3 As to testamentary and administration expenses see PARA 432 et seq post.

4 In the preferential debts listed in the Insolvency Act 1986 s 386, Sch 6 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 577 et seq): see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(2). Where the petition is presented after the debtor's death, in the exercise of his functions under the Insolvency Act 1986 s 305 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 456) where an insolvency administration order has been made, the trustee must have regard to any claim by the personal representative to payment of reasonable funeral, testamentary and administration expenses incurred by him in respect of the deceased debtor's estate or, if there is no such personal representative, to any claim by any other person to payment of any such expenses incurred by him in respect of the estate provided that the trustee has sufficient funds in hand for the purpose, and such claims have priority over the preferential debts listed in Sch 6: s 305(5) (added as a modification to s 305 by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt I para 20); art 3(1).

5 See PARA 391 ante.

6 These apply to all classes of administration of insolvent estates, whether in or out of court: *A-G v Jackson*[1932] AC 365 at 484, HL.

7 For the rules as to secured and unsecured creditors see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 522, 560 et seq. See also PARA 405 post.

8 For the rules as to debts and liabilities provable see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 490 et seq.

In the event of the insolvency of an estate against which proceedings are maintainable by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 s 1 (as amended) (see PARA 815 et seq post), any liability in respect of the cause of action in respect of which the proceedings are maintainable is deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust: s 1(6).

9 For the rules as to the valuation of future and contingent liabilities see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 493, 503, 540, 546.

10 For the rules as to priority of debts see the Insolvency Act 1986 Sch 6; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 573 et seq. See also *Re Whitaker, Whitaker v Palmer*[1901] 1 Ch 9, CA (voluntary creditors to be paid *pari passu* with creditors for value).

11 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(1), (2). See *Re Pink, Elvin v Nightingale*[1927] 1 Ch 237 at 241; *Re Bush, B Lipton Ltd v Mackintosh*[1930] 2 Ch 202 at 207-208; *A-G v Jackson*[1932] AC 365 at 384, HL (decided under the Administration of Estates Act 1925 s 34(1), Sch 1 Pt I para 2 (repealed); which contained similar provisions to the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999). The relevant provisions of the Insolvency Act 1986 bind the Crown: see s 434 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 3); cf *A-G v Jackson* supra; *Re Mitchell, Hatton v Jones*[1954] Ch 525 at 529, [1954] 2 All ER 246 at 248. The requirement that a trustee in bankruptcy must be a qualified insolvency practitioner (see the Insolvency Act 1986 s 292(2); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 316) does not apply in relation to a personal representative who administers an insolvent estate otherwise than in bankruptcy: see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(3).

12 In the provisions of the Insolvency Act 1986 specified in the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pts II, III: see art 3(1).

13 In as modified by *ibid* Sch 1 Pts I, II and with any further such modifications as may be necessary to render them applicable to the estate of a deceased person: see art 3(1).

14 *Ibid* art 3(1). The provisions of the Insolvency Rules 1986, SI 1986/1925 (as amended) and any order made under the Insolvency Act 1986 s 415 (fees and deposits) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 816) also apply accordingly: see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1). In the case of any conflict between any provision of the Insolvency Rules 1986, SI 1986/1925 (as amended) and any provision of the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, the provisions of the latter prevail: art 3(2).

15 *Ibid* art 5(1). In such case the modifications specified in art 5(1), Sch 2 apply: art 5(1).

16 *Ibid* art 5(2). The preferential debts are those listed in the Insolvency Act 1986 Sch 6: see art 5(2).

17 *Ibid* art 5(3).

UPDATE

399 Application of bankruptcy rules

NOTE 1--Insolvency Act 1986 s 421 further amended: Constitutional Reform Act 2005 Sch 4 para 192.

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400. Cases of doubtful solvency.

The rules referred to in the preceding paragraph also prevail where there is sufficient reason to believe that the estate will turn out insolvent¹, and to an estate which, though sufficient for payment in full of the deceased's debts and liabilities apart from the costs of administration, becomes insufficient by reason of those costs², and to an estate which, although otherwise solvent, is shown to be insolvent when the capitalised value of an annuity which the testator was under an obligation to pay is taken into account³. The court may direct an inquiry whether the estate is insolvent⁴.

1 *Re Hopkins, Williams v Hopkins* (1881) 18 ChD 370 at 377, CA, per Jessel MR. Although the language of the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(1) (see PARA 399 ante) is not quite the same as that of the Supreme Court of Judicature Act 1875 s 10 (repealed) ('may prove to be' insolvent), the problem is the same, and it is a question of fact whether there is good ground for believing that the estate will turn out to be insolvent: *Re Pink, Elvin v Nightingale* [1927] 1 Ch 237 at 241. See also PARA 399 note 11 ante. As to the statutory protection of a personal representative who pays a debt in full when he had no reason to believe the estate was insolvent see PARA 401 post; and as to protection against contingent liabilities see PARAS 408-409 post.

2 *Re Leng, Tarn v Emmerson* [1895] 1 Ch 652, CA.

3 *Re Pink, Elvin v Nightingale* [1927] 1 Ch 237.

4 *Re Smith, Green v Smith* (1883) 22 ChD 586. It is not the proper practice to insert in the administration order a direction that the bankruptcy rules are to apply: *Re Murray, Woods v Greenwell* (1882) 45 LT 707, not following *Re Hildick, Hipkins v Hildick* (1881) 44 LT 547. As to administration in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 823 et seq.

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401. Protection of personal representatives paying debts in full.

A personal representative is not liable to account to a creditor of the same degree as a paid creditor on the insolvency of the estate¹, provided that either: (1) the debt was paid to a creditor of the estate (including the personal representative himself so long as he has not obtained the grant solely by reason of his being a creditor) in good faith and at a time when he has no reason to believe that the estate is insolvent²; or (2) being an administrator who has obtained the grant solely by reason of his being a creditor he has in good faith paid the debt of a creditor other than himself at a time when he has no reason to believe that the estate is insolvent³.

1 Administration of Estates Act 1971 s 10(2).

2 Ibid s 10(2)(a).

3 Ibid s 10(2)(b). These provisions were enacted in connection with the abolition (by s 10(1)) in relation to the estates of persons dying on or after 1 January 1972 (see ss 12(6), 14(2)) of the former right of a personal representative to retain out of the assets of the estate sufficient to meet a debt owing to himself as against

creditors of equal or lower degree, and his former right to prefer creditors of the same class. For observations on the effect of the abolition see JHG Sunnucks 'Debts-Preference and Retainer' [1972] 122 NLJ 26.

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402. Interest on debts.

Where an insolvent estate subsequently realises sufficient to pay the principal of all the debts¹, the bankruptcy rule² as to *pari passu* payment of interest³ upon all debts, whether by law carrying interest or not, prevails over the Chancery rule⁴ that interest on debts which do not by law carry interest is to be paid only after the interest is paid on the debts which do carry interest⁵.

1 See eg *Leeder v Ellis* [1953] AC 52, [1952] 2 All ER 814, PC.

2 See the Insolvency Act 1986 s 328(4), (5); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 585.

3 In the case of an insolvent estate of a deceased person the interest is paid from the date of death of the deceased debtor at whichever is the greater of the rate specified in Judgments Act 1838 s 17 (as amended) at the date of death of the deceased debtor or the rate applicable to the debt apart from the bankruptcy: Insolvency Act 1986 s 328(4), (5) (modified by the Administration of Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 24).

4 See CPR Sch 1 RSC Ord 44 r 9. As to the CPR see PARA 37 note 3 ante.

5 *Re Whitaker, Whitaker v Palmer* [1904] 1 Ch 299, disapproving *Re Henley, Alcock v Henley* (1896) 75 LT 307. Cf para 733 post.

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403. Time for proving debt.

A creditor may come in at any time so long as there are assets remaining undistributed¹, provided he has not been guilty of wilful default in not sending in his claim previously². He is, however, put upon the terms of paying the costs occasioned by his application, and is not allowed to disturb prior distributions or to delay the payment of dividends to the other creditors. A similar practice prevails in bankruptcy³.

1 *Lashley v Hogg* (1805) 11 Ves 602; *Angell v Haddon* (1816) 1 Madd 529; *David v Frowd* (1833) 1 My & K 200 at 209; *Brown v Lake* (1847) 1 De G & Sm 144; *Brett v Carmichael* (1866) 35 Beav 340; *Re Metcalf, Hicks v May* (1879) 13 ChD 236, CA; *Harrison v Kirk* [1904] AC 1, HL.

2 *Hull v Falconer* (1865) 5 New Rep 266.

3 *Re McMurdo, Penfield v McMurdo* [1902] 2 Ch 684 at 699, CA, per Vaughan Williams LJ. See also the Insolvency Act 1986 s 325 (rights of creditor who proves after one or more dividends have been declared), s

330(4) (effect of final dividend); the Insolvency Rules 1986, SI 1986/1925, r 11.8 (proof altered after payment of dividend); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 598, 605.

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404. Creditors who have disappeared.

Where funds subsequently fall in, but some of the creditors whose proofs have been allowed have disappeared, the court does not divide the entire fund among the creditors who can be traced, but retains a sum to meet the claims of those who have disappeared¹.

1 *Re Macdonald, McAlpin v Macdonald* (1889) 59 LJ Ch 231; *Ashley v Ashley* (1877) 4 ChD 757, CA.

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405. Secured creditors.

A secured creditor¹ cannot prove for the whole of his debt and rely upon his security for any balance which, owing to the deficiency of assets, might remain unpaid. Under the insolvency rules the secured creditor who wishes to prove against the estate must do one of three things: (1) he may realise his security and prove for the balance²; (2) he may surrender his security for the general benefit of creditors, and prove for his whole debt, as if it were unsecured³; or (3) he may assess his security and receive dividends on the balance due to him after deducting the assessed value⁴. So long as there are assets remaining undistributed he may, however, with the agreement of the trustee in bankruptcy or the leave of the court⁵ alter the value which he has put on his security in his proof⁶, or prove for the first time after one or more dividends have been declared⁷.

A secured creditor who chooses to rest upon his security without adopting any one of the above courses has no debt provable in respect of which any reserve is to be made on a declaration of a dividend⁸. A creditor of two estates for the same debt receives dividends on the whole of his debts from both estates until satisfied⁹.

1 A creditor has a secured debt for the purpose of the insolvency rules to the extent that the he holds any security for the debt (whether a mortgage, charge, lien or other security) over any property of the debtor, other than a lien on books, papers or other records (except to the extent that they consist of documents of title to property and are held as such): Insolvency Act 1986 s 383(2), (4).

2 Insolvency Rules 1986, SI 1986/1925, r 6.109(1).

3 Ibid r 6.109(2).

4 See ibid r 6.98(1)(g).

5 If he is the petitioner and it is a value he has put in the petition, or he has voted in respect of the unsecured balance, he can only revalue the security with the leave of the court: ibid r 6.115(2).

6 Ibid r 6.115(1). If the revaluation increases the amount of the debt which is unsecured, it will not disturb dividends already declared but will entitle the creditor to payment of any missed dividends (if there are sufficient assets remaining) before any further dividends are paid: see r 11.9(3). The trustee in bankruptcy has a right to redeem a security at the value put on it in the creditor's proof, subject to the creditor having an opportunity to apply to revalue it (see r 6.117), and a right to require a sale of the security (see r 6.118). See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 550 et seq.

7 See the Insolvency Act 1986 s 325(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 598. Cf under the former law *Re McMurdo, Penfield v McMurdo* [1902] 2 Ch 684, CA; *Re Becher* [1944] Ch 78.

8 See *Re Lee, ex p Good* (1880) 14 ChD 82, CA.

9 *Bonser v Cox* (1842) 6 Beav 84.

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406. Assets available for creditors.

In contrast to the previous law¹, where the insolvent estate of a deceased person is being administered in bankruptcy, the provisions of the bankruptcy legislation for setting aside transactions at an undervalue or preferences², rendering dispositions void³, and restricting proceedings and the rights of creditors under execution or attachment⁴, apply.

Whether or not such an estate is being administered in bankruptcy, an application can be made for an order nullifying the effect of a transaction defrauding creditors⁵.

Any severable share under a joint tenancy which the deceased owned is not available for his creditors⁶.

1 Ie before the Insolvency Act 1986 replaced the Bankruptcy Act 1914 with effect from 29 December 1986. See *Re Gould, ex p Official Receiver* (1887) 19 QBD 92, CA, which held that the bankruptcy provisions for setting aside voluntary settlements did not apply to the administration of insolvent estates of deceased persons in bankruptcy; *Re Eichholz, Eichholz's Trustee v Eichholz* [1959] Ch 708.

2 See the Insolvency Act 1986 ss 339-342 (s 342 as amended); applied and modified by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II paras 26-28. The provisions for setting aside extortionate credit transactions (see the Insolvency Act 1986 s 343) and for the avoidance of general assignments of book debts unregistered under the Bills of Sale Act 1878 (see the Insolvency Act 1986 s 344) also apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 434 et seq.

3 See the Insolvency Act 1986 s 284 (applied to the insolvent estate of a deceased person by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12) which renders void any disposition or payment made after the death of the debtor unless made with the consent of the court or subsequently ratified by it.

4 See the Insolvency Act 1986 s 285 (applied to the insolvent estate of a deceased person by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 12) which restrains obtaining any remedy or (except with the leave of the court) commencing any legal proceedings after the debtor's death. See also the Insolvency Act 1986 s 346 (restrictions on enforcement procedures after bankruptcy order) and s 347 (distress for rent) which apply after the making of an insolvency administration order by virtue of the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 28. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 686 et seq, 730.

5 See the Insolvency Act 1986 ss 423-425; applied by the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, Sch 1 Pt II para 36. If an insolvent administration order has been made only

the official receiver or the trustee in bankruptcy can apply for an order under the Insolvency Act 1986 ss 423-425, but if no insolvent administration order has been made only a victim of the transaction can do so (see s 424). If such a transaction is set aside by a victim of the transaction the assets recovered fall into the estate: see ss 423(2)(a), 424(2), 425(1)(a); and *Richardson v Smallwood* (1822) Jac 552. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 663 et seq.

6 *Re Palmer (A Debtor)* [1994] Ch 316, [1994] 3 All ER 835, CA. The position might be otherwise if bankruptcy proceedings were sufficiently far advanced before the debtor's death to sever the joint tenancy: see *Re Palmer (A Debtor)* supra at 341, 839 per Balcombe LJ. As to the availability to pay the deceased's debts of assets over which a general power has been exercised see PARA 387 ante.

UPDATE

406 Assets available for creditors

NOTE 4--Insolvency Act 1986 ss 346, 347 amended: Courts Act 2003 Sch 8 paras 297, 298.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/ (3) DISCHARGE OF LIABILITIES NOT PRESENTLY DUE/407. Contingent liabilities.

(3) DISCHARGE OF LIABILITIES NOT PRESENTLY DUE

407. Contingent liabilities.

Where the estate is insolvent, contingent liabilities are provided for in accordance with the rules applicable in bankruptcy¹. Where the estate is solvent the personal representative is not entitled as against creditors to make provision for contingent liabilities because such liabilities do not constitute a debt until the contingency has arisen², and accordingly a creditor, even of inferior degree, is entitled to be paid in full without regard to the contingency that the liability may ripen into a debt³.

A personal representative, however, can only distribute the assets among the beneficiaries without regard to contingent liabilities at his peril⁴. Accordingly, if the estate comprises shares in a joint stock company not fully paid up, and the executor pays a legacy, and a call is subsequently made upon the shares, the representative is liable to pay the amount of the legacy toward satisfaction of the call⁵.

1 See PARA 399 ante.

2 See *Re Hargreaves, Dicks v Hare* (1890) 44 ChD 236, CA.

3 *Eeles v Lambert* (1648) 2 Vern 101n; *Read v Blunt* (1832) 5 Sim 567.

4 As to the protection of the personal representative by application to the court for permission to distribute see PARA 409 post. As to the lien of a personal representative or trustee over the estate or trust fund for liabilities which may be incurred under a statute not yet in force see *X v A* [2000] 1 All ER 490.

5 *Taylor v Taylor* (1870) LR 10 Eq 477. See also COMPANIES vol 15 (2009) PARA 1145. As to the representative's right to have the payment refunded by the legatee see PARA 515 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/ (3) DISCHARGE OF LIABILITIES NOT PRESENTLY DUE/408. Protection in regard to leaseholds, etc.

408. Protection in regard to leaseholds, etc.

Statutory protection is given to a personal representative or trustee¹ who as such: (1) is liable for any rent, covenant or agreement reserved by or contained in any lease²; (2) is liable for any rent, covenant or agreement payable under or contained in any grant³ made in consideration of a rentcharge⁴; (3) is liable for any indemnity given in respect of any such rent, covenant or agreement⁵; or (4) has entered into or may be required to enter into an authorised guarantee agreement⁶ with respect to any lease comprised in the deceased's estate or the trust estate⁷.

In relation to the first three categories, the protection is available where the personal representative or trustee satisfies all liabilities under the lease or grant which may have accrued, and been claimed, up to the date of the conveyance or transfer of the property in question, and, where necessary, sets apart a sufficient fund to answer any future claim in respect of any fixed and ascertained sum which the lessee or grantee⁸ agreed to lay out on the property demised or granted, even though the period for laying it out may not have arrived⁹; in any such case the personal representative or trustee may convey or transfer the property to a purchaser¹⁰, legatee, devisee or other person entitled to call for a conveyance or transfer of it¹¹.

In relation to the fourth category, the statutory protection is available without more in the case of a potential liability to enter into an authorised guarantee agreement, and in the case of such an agreement already entered into it is available where the personal representative or trustee satisfies all liabilities under the agreement which may have accrued and been claimed up to the date of distribution¹². Thereafter he may distribute the residuary real and personal estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart to answer a future claim to a fixed and ascertained sum), to or among the persons entitled, without appropriating any part, or any further part, as the case may be, of the estate to meet any future liability under the lease or grant¹³, or under any authorised guarantee agreement, or any potential liability to enter into any authorised guarantee agreement¹⁴, and, notwithstanding such distribution, he will not be personally liable in respect of any subsequent claim under the lease or grant¹⁵ or under any authorised guarantee agreement¹⁶. However, the right of the lessor or grantor or the persons deriving title under him to follow the assets or trust property into the hands of the persons among whom they have been distributed¹⁷ is not prejudiced, and these provisions apply notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust¹⁸.

This statutory protection does not, however, extend to protect an executor who by entering into possession of his testator's leaseholds has incurred in addition to his liability as an executor the personal liability of an assignee of the term¹⁹.

1 See also PARA 770 post.

2 Trustee Act 1925 s 26(1)(a). 'Lease' includes an underlease and an agreement for a lease or underlease and any instrument giving any such indemnity as is mentioned in s 26(1) or varying the liabilities under the lease: s 26(3).

3 'Grant' applies to a grant whether the rent is created by limitation, grant, reservation or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as is mentioned in *ibid* s 26(1), or varying the liabilities under the grant: s 26(3).

4 *Ibid* s 26(1)(b).

5 *Ibid* s 26(1)(c).

6 'Authorised guarantee agreement' has the same meaning as in Landlord and Tenant (Covenants) Act 1995 (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 593); Trustee Act 1925 s 26(1A) (added by the Landlord and Tenant (Covenants) Act 1995 s 30(1), Sch 1 para 1). It can only relate to a lease granted after 31 December 1995: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 593.

7 Trustee Act 1925 s 26(1A) (as added: see note 6 supra).

8 'Lessee' and 'grantee' include persons respectively deriving title under them: *ibid* s 26(3).

9 *Ibid* s 26(1) (amended by the Law of Property (Amendment) Act 1926 ss 7, 8(2), Schedule).

10 In the Law of Property (Amendment) Act 1859 s 27 (repealed) (which these provisions replace), 'purchaser' meant a person who bought the lease and paid a price in money for it; it did not include an assignee who was paid money for taking over the lease and indemnifying the executor: *Re Lawley, Jackson v Leighton* [1911] 2 Ch 530.

11 Trustee Act 1925 s 26(1) (as amended: see note 9 supra).

12 *Ibid* s 26(1A) (as added: see note 6 supra).

13 *Ibid* s 26(1)(i). See also *Millar v Sinclair* [1903] 1 IR 150.

14 Trustee Act 1925 s 26(1A)(a) (as added: see note 6 supra).

15 *Ibid* s 26(1)(ii).

16 *Ibid* s 26(1A)(b) (as added: see note 6 supra).

17 See PARA 523 post. As to the right to follow assets see PARA 514 et seq post.

18 Trustee Act 1925 s 26(2).

19 *Re Owers, Public Trustee v Death* [1941] Ch 389, [1941] 2 All ER 589. See also PARA 409 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/ (3) DISCHARGE OF LIABILITIES NOT PRESENTLY DUE/409. Protection under court order.

409. Protection under court order.

Where the estate is subject to contingent liabilities not within the statutory protection¹ a personal representative ought not to distribute the assets amongst the beneficiaries without the sanction of the court. Provided the representative keeps back nothing which ought to be disclosed to the court, the court order authorising distribution is a complete indemnity to him in respect of the consequent application of the assets², and it is therefore unnecessary for the court to retain funds in court for his protection³, or, it is conceived, to direct the beneficiaries to indemnify him⁴. The court will, however, order the retention of sufficient sums in court where the contingent liability of the estate is dependent only on the survivorship of annuitants⁵. Where the representative, by remaining in possession of the deceased's leaseholds, renders himself liable to be sued in his personal character as assignee of the term⁶, he is entitled to be secured against the lessor's claims by retention of assets or by a proper indemnity from the beneficiaries⁷, unless he has already executed an assent in respect of those leaseholds⁸.

Where a sum has been retained in court to meet a contingent debt it will be paid out to the beneficiaries on the expiration of the period after which the creditor's action would be statute-barred⁹.

A contingent creditor of the estate may not be entitled to an order for administration¹⁰.

1 See PARA 408 ante.

2 *Dean v Allen* (1855) 20 Beav 1; *Waller v Barrett* (1857) 24 Beav 413; *Smith v Smith* (1861) 1 Drew & Sm 384; *Re King, Mellor v South Australian Land Mortgage and Agency Co* [1907] 1 Ch 72. See also *Re Yorke, Stone v Chataway* [1997] 4 All ER 907, where it was held that it is advisable for the personal representatives of a deceased Lloyd's name protected by Equitas reinsurance to seek the protection of the court before distributing the deceased's assets if there is a risk of future claims being made against the estate. For the procedure see *Chancery Division Practice Direction--Trusts* CDPD 12 para G.

3 *Re King, Mellor v South Australian Land Mortgage and Agency Co* [1907] 1 Ch 72, in which the judgment of Neville J reviews the prior authorities, among which there was some conflict of opinion. In *Fletcher v Stevenson* (1844) 3 Hare 360, it was held that the covenantee had an equity to have a fund set aside to meet a contingent claim. In *King v Malcott* (1852) 9 Hare 692; *Smith v Smith* (1861) 1 Drew & Sm 384; *Dodson v Sammell* (1861) 1 Drew & Sm 575, it was held that he had no such equity.

4 *Re Nixon, Gray v Bell* [1904] 1 Ch 638; *Re King, Mellor v South Australian Land Mortgage and Agency Co* [1907] 1 Ch 72. For a form of order see *Re Sales, Powsland v Roberts* [1920] WN 54; *Re Johnson, Johnson v King Edward Hospital Fund for London* [1940] WN 195.

5 *Re Arnold, Calvert v Whelen* [1942] Ch 272, [1942] 1 All ER 501. It appears from this case that this question is now a matter of degree in the remoteness or otherwise of the contingency.

6 As to the extent of his liability see PARA 771 post.

7 *Re Nixon, Gray v Bell* [1904] 1 Ch 638; *Re Owers, Public Trustee v Death* [1941] Ch 389, [1941] 2 All ER 589.

8 *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher* [1943] 1 All ER 467.

9 *Re Lewis, Jennings v Hemsley* [1939] Ch 232, [1939] 3 All ER 269. See generally LIMITATION PERIODS.

10 *Re Hargreaves, Dicks v Hare* (1890) 44 ChD 236, CA. As to the requirements for making a claim see further PARA 719 post.

UPDATE

409 Protection under court order

NOTE 2--*Chancery Division Practice Direction--Trusts* CDPD 12 para G now *Practice Note* [2001] 3 All ER 765. See also *Re K* [2007] EWHC 622 (Ch), [2007] WTLR 1007.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN ADMINISTRATION/(i) In general/410. Exclusion of statutory order by creation of mixed fund.

(4) ORDER OF APPLICATION OF ASSETS IN ADMINISTRATION

(i) In general

410. Exclusion of statutory order by creation of mixed fund.

When an estate is insolvent, the contest is between the creditors among themselves as to the priority in which their debts are to be paid¹. When an estate is solvent, the creditors are paid in full and the contest is between the beneficiaries among themselves: (1) as to the order in which resort is had to the various parts of the estate for payment of the debts and liabilities;

and (2) what parts of the estate are charged with payment of the pecuniary legacies and in what order. Both these matters which arise in the administration and distribution of a solvent estate are to be determined primarily² by the directions, if any, contained in the will, and the statutory order of application of assets³ takes effect subject to those directions⁴.

Accordingly, where a testator combines his real and personal estate in one general fund, and directs the whole of that fund to be applied for the payment of debts or legacies, the creation of the mixed fund excludes the statutory order of application of assets⁵, and the real and personal estate must be applied in the discharge of the debts or legacies rateably according to their respective values⁶. A gift of real and personal estate together, coupled with a direction to sell and to pay debts or legacies out of the proceeds, creates a mixed fund⁷; a direction that the real estate is to be sold and that the proceeds of sale are to be considered as part of the personal estate will have the same effect⁸. It is not necessary that there should be an absolute conversion directed by the will; a power of sale may be sufficient if, from the terms of the will as a whole, it can be gathered that the testator had the intention of creating a mixed fund⁹. The mere gift of real and personal estate together, coupled with a direction to pay debts or legacies, or a trust for the payment of debts or legacies, is not by itself sufficient to constitute a mixed fund in the absence of words in the will showing an intention on the testator's part that his real estate should be sold for the purpose of meeting the debts or legacies¹⁰.

1 As to insolvent estates see PARA 399 ante.

2 In subject to any variation which may be made by an order under the Inheritance (Provision for Family and Dependents) Act 1975 (see PARA 665 et seq post). As to the danger of distribution without regard to the possibility of such an order see PARA 477 post.

3 See PARA 416 et seq post.

4 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 8(a). See *Re Petty, Holliday v Petty*[1929] 1 Ch 726; *Re Kempthorne, Charles v Kempthorne*[1930] 1 Ch 268, CA; *Re Martin, Midland Bank Executor and Trustee Co Ltd v Marfleet*[1955] 1 All ER 865; *Re Berrey's Will Trusts, Greening v Warner*[1959] 1 All ER 15, [1959] 1 WLR 30; *Re Feis, Guillaume v Ritz-Remorff*[1964] Ch 106 at 117, [1963] 3 All ER 303 at 310; *Re Wilson, Wilson v Mackay*[1967] Ch 53 at 66, [1966] 2 All ER 867 at 871; *Re Eleanor Taylor's Estate and Will Trusts, Re Jane Taylor's Estate and Will Trusts, Taylor v Taylor*[1969] 2 Ch 245, [1969] 1 All ER 113. Where a question arises as to the property on which a charge of debts is to operate, the court inclines to a construction which gives the creditors a charge on the larger amount of property: *Noel v Weston* (1813) 2 Ves & B 269 at 274.

5 *Re Petty, Holliday v Petty*[1929] 1 Ch 726 (statutory order varied so far as it provided for payment primarily out of lapsed share of residue as property undisposed of; cf para 416 head (1) post).

6 *Roberts v Walker* (1830) 1 Russ & M 752; *Simmons v Rose* (1856) 6 De GM & G 411.

7 *Roberts v Walker* (1830) 1 Russ & M 752; *Stocker v Harbin* (1841) 3 Beav 479; *Salt v Chattaway* (1841) 3 Beav 576; *Dunk v Fenner* (1831) 2 Russ & M 557; *Fourdrin v Gowdey* (1834) 3 My & K 383; *Tatlock v Jenkins* (1854) Kay 654; *Bedford v Bedford* (1865) 35 Beav 584.

8 *Kidney v Coussmaker* (1797) 7 Bro Parl Cas 573, HL; *Bright v Larcher* (1858) 3 De G & J 148; *Simmons v Rose* (1856) 6 De GM & G 411.

9 *Allan v Gott*(1872) 7 Ch App 439; *Re Timson, Harper v Timson*[1953] 2 All ER 1252, [1953] 1 WLR 1361.

10 *Boughton v Boughton, Boughton v James* (1848) 1 HL Cas 406; *Tench v Cheese* (1855) 6 De GM & G 453; *Wells v Row* (1879) 48 LJ Ch 476; *Luckcraft v Pridham* (1879) 48 LJ Ch 636; *Re Smith, Smith v Smith*[1913] 2 Ch 216 at 223; and see *Re Cowell, Temple v Temple* (1920) 150 LT Jo 296.

411. Other ways in which statutory order may be displaced.

The creation of a mixed fund is not the only way by which the statutory order for the payment of funeral, testamentary and administration expenses, debts and liabilities¹, can be displaced. Accordingly, a direction for payment of such expenses out of the proceeds of the conversion of the testator's personal estate², or a gift of residue subject to the payment of such expenses³, is sufficient to exclude the statutory order so far as it provides primarily for payment out of property undisposed of by will⁴; but a mere direction to pay such expenses, followed by a gift of residue⁵, or a gift of residue followed by a direction to pay duty⁶, will not exclude the statutory order. Again, an express charge of such expenses on specific bequests, followed by a gift of residue to a legatee other than the legatees of the specific property, excludes the statutory order and renders such expenses primarily payable out of the specific bequests to the exoneration of residue⁷, whereas a charge of such expenses on a legacy, the residue being undisposed of, is insufficient to exclude the statutory order so as to make the legacy the primary fund for payment in place of the undisposed of estate⁸.

1 See PARA 416 et seq post. As to mixed funds see PARA 410 ante.

2 *Re Atkinson, Webster v Walter* [1930] 1 Ch 47; *Re Martin, Midland Bank Executor and Trustee Co Ltd v Marfleet* [1955] Ch 698, [1955] 1 All ER 865 (payment primarily out of proceeds of conversion and not out of undisposed of realty, as provided by statute; cf para 417 post).

3 *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA; *Re Harland-Peck, Hercy v Mayglothing* [1941] Ch 182, [1940] 4 All ER 347, CA (payment out of entire residue, not out of lapsed share; cf para 417 post).

4 See PARA 417 post.

5 *Re Lamb, Vipond v Lamb* [1929] 1 Ch 722 (payment out of lapsed share of residue); criticised in *Re Cruse, Gass v Ingham* [1930] WN 206; *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268 at 298, CA; but approved and applied in *Re Tong, Hilton v Bradbury* [1931] 1 Ch 202, CA (payment out of lapsed share of income of residue); *Re Worthington, Nichols v Hart* [1933] Ch 771, CA (payment out of lapsed share of residue).

6 *Re Sanger, Taylor v North* [1939] Ch 238, [1938] 4 All ER 417 (payment out of lapsed share of residue).

7 *Re Littlewood, Clark v Littlewood* [1931] 1 Ch 443; *Re James, Lloyds Bank Ltd v Atkins* [1947] Ch 256, [1947] 1 All ER 402; *Re Meldrum, Swinson v Meldrum* [1952] Ch 208, [1952] 1 All ER 274 (in effect varying the order contained in the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II paras 2, 3 (see PARAS 418-419 post)). See also *Re Ridley, Nicholson v Nicholson* [1950] Ch 415, [1950] 2 All ER 1 (general devise of realty 'free of all death duties' followed by bequest of pecuniary legacies and residuary gift; intention shown that realty should not be resorted to until personalty exhausted; devise of realty a specific and not a residuary disposition).

8 *Re Gordon, Watts v Rationalist Press Association Ltd* [1940] Ch 769, [1940] 3 All ER 205, where it was held, following a dictum of Maugham J in *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268 at 278, CA, that such a charge could not in itself be sufficient to displace the statutory order in view of the fact that property so charged and property given for the payment of debts are expressly allocated places in the statutory order after property undisposed of (see PARAS 417, 419-420 post; see also *Re Meldrum, Swinson v Meldrum* [1952] Ch 208 at 213-214, [1952] 1 All ER 274 at 277, where it was pointed out that it is a question purely of construction of each will whether or not the testator has varied the statutory order).

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THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN
ADMINISTRATION/(i) In general/412. Where exonerated gift lapses.

412. Where exonerated gift lapses.

The right to exoneration does not enure for the benefit of a person who becomes entitled to a lapsed gift, whether the fund appropriated to the exoneration is one of realty¹ or of specific personal assets², the right to the benefit of the exoneration being, in fact, a part of the legacy which has failed³.

1 *Dacre v Patrickson* (1860) 1 Drew & Sm 182.

2 *Re Meere, Kilford v Blaney* (1885) 31 ChD 56, CA, overruling on this point *Browne v Groombridge* (1819) 4 Madd 495.

3 *Re Meere, Kilford v Blaney* (1885) 31 ChD 56 at 66, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN ADMINISTRATION/(i) In general/413. Statutory order of application of assets.

413. Statutory order of application of assets.

Subject to the directions of the will, the order in which assets are to be applied in the discharge of the debts and liabilities is based upon the presumed intentions of the testator, and these have been given statutory form¹.

1 See the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II, which applies in the case of persons dying after 31 December 1925: see PARAS 416-423 post. As to the extent, if any, to which the statutory order applies to the discharge of legacies see PARA 525 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN ADMINISTRATION/(i) In general/414. Secured and unsecured debts.

414. Secured and unsecured debts.

The statutory order of application¹ applies to the discharge of unsecured debts, whereas secured debts are primarily payable out of the property on which they are charged². In accordance with this principle, where a person has contracted to purchase property and dies before paying the purchase money, the property contracted to be purchased is primarily liable for the unpaid purchase money, unless by his will or deed or other document he has signified a contrary intention, and a devisee or successor is not entitled to have the unpaid purchase money discharged or satisfied out of any other part of the testator's estate³.

1 See PARA 413 ante.

2 See the Administration of Estates Act 1925 s 35; and PARA 424 et seq post.

3 See *ibid* s 35, replacing, as regards estates of persons dying after 1925, the Real Estate Charges Act 1854, the Real Estate Charges Act 1867, and the Real Estate Charges Act 1877, a series of statutes which are known as Locke King's Acts and are repealed as respects deaths after 1925. See also *Re Cockcroft, Broadbent v Groves* (1883) 24 ChD 94; *Re Birmingham, Savage v Stannard* [1959] Ch 523, [1958] 2 All ER 397; following

Lysaght v Edwards (1876) 2 ChD 499; *Re Kidd, Brooman v Withall* [1894] 3 Ch 558; and cf *Re Coxen, MacCullum v Coxen* [1948] 2 All ER 492 at 496. See also PARAS 424 text and note 6, 426 text and note 7 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN ADMINISTRATION/(i) In general/415. Marshalling.

415. Marshalling.

The principle of marshalling in the administration of assets is a process of adjustment directed to ensuring that assets are ultimately applied in accordance with their proper order of liability, notwithstanding that in the actual course of administration assets more remotely liable have been used in priority to those more immediately liable¹. Accordingly, where debts are charged on real estate, but are in fact paid out of personalty, with the result that pecuniary legatees are disappointed, the legatees have an equitable right to compensation², and to have the assets marshalled so as to render the real estate charged with debts available for their legacies³. The doctrine of marshalling in this connection is considered elsewhere in this work⁴.

1 *Re Townley, Public Trustee v Alder* [1922] 1 Ch 154 at 159, a case of marshalling in favour of specific and pecuniary legacies to the prejudice of residue.

2 *Re Cohen, National Provincial Bank Ltd v Katz* [1960] Ch 179 at 190, [1959] 3 All ER 740 at 745; *Re Matthews' Will Trusts, Bristow v Matthews* [1961] 3 All ER 869 at 873, [1961] 1 WLR 1415 at 1419.

3 *Re Stokes, Parsons v Miller* (1892) 67 LT 223; *Re Salt, Brothwood v Keeling* [1895] 2 Ch 203; *Re Roberts, Roberts v Roberts* [1902] 2 Ch 834; *Re Kempster, Kempster v Kempster* [1906] 1 Ch 446; *Re Bate, Bate v Bate* (1890) 43 ChD 600, contra, is overruled.

4 See EQUITY vol 16(2) (Reissue) PARA 758 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN ADMINISTRATION/(ii) Order in Payment of Debts and Liabilities/416. Order of application since 1925.

(ii) Order in Payment of Debts and Liabilities

416. Order of application since 1925.

In the case of death after 1925¹ the statutory order of application applies². Subject to rules of court and the statutory provisions as to charges on the deceased's property, and to any provisions contained in his will³, the deceased's real and personal estate⁴ is applicable towards the discharge of the funeral, testamentary and administration expenses⁵, debts and liabilities payable out of it in the following order⁶:

- (1) property undisposed of by will⁷;
- (2) property included in a residuary gift⁸;
- (3) property the subject of specific gifts⁹;
- (4) property charged with the payment of debts¹⁰;

- (5) the fund for pecuniary legacies¹¹;
- (6) property specifically devised or bequeathed¹²; and
- (7) property appointed under a general power¹³.

The statutory order deals only with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate¹⁴.

1 Where the will was made before 31 December 1925, although in administering the estate the provisions in the text relating to the order of application of assets must be applied, yet in construing the will regard must be had to the law in force at the time of its execution, ie before the alterations in the law were made: *Re Atkinson, Webster v Walter*[1930] 1 Ch 47 at 50; *Re Littlewood, Clark v Littlewood*[1931] 1 Ch 443 at 445. As to the distinction between the payment of debts and liabilities in administering an estate on the one hand and the incidence of legacies and other questions of priority arising on distribution see PARA 525 post.

As to the position where the estate is insolvent see PARA 399 ante. As to the distinction between legal and equitable assets formerly prevailing in relation to the order of payment of debts see EQUITY vol 16(2) (Reissue) PARA 461.

2 Ie by the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II.

3 See PARA 410 ante. For the meaning of 'will' see PARA 3 note 1 ante.

4 For the meaning of 'real estate' see PARA 3 note 1 ante. These words include the real estate of a person of unsound mind which devolves on the heir at law under the Administration of Estates Act 1925 s 51(2) (amended by the Mental Treatment Act 1930 s 20(5); and the Mental Health Act 1959 s 149(2), Sch 8); *Re Gates, Gates v Gates*[1930] 1 Ch 199. Where, by reason of an election to take under an instrument, property has been set free to pass under an instrument, that property becomes subject to all the incidents to which it would have been subject had it been throughout the property of the testator: *Re Williams, Cunliffe v Williams*[1915] 1 Ch 450 at 456.

5 As to the meaning of 'funeral expenses' see CREMATION AND BURIAL. As to testamentary and administration expenses see PARA 432 et seq post. As to the order of application of assets in the payment of legacies see PARA 525 post.

6 Administration of Estates Act 1925 s 34(3).

7 See PARA 417 post.

8 See PARA 418 post.

9 See PARA 419 post.

10 See PARA 420 post.

11 See PARA 421 post.

12 See PARA 422 post.

13 See PARA 423 post.

14 *Re Tong, Hilton v Bradbury*[1931] 1 Ch 202 at 212, CA.

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417. Property undisposed of by will.

If there is property¹ of the deceased undisposed of by will², and if as a matter of construction the will does not otherwise provide³, this undisposed of property is first applicable in payment of debts and liabilities, but subject to the retention out of it of a fund sufficient to meet any pecuniary legacies⁴. Included in property undisposed of by will are a lapsed share of residue⁵ or of income⁶ and a lapsed devise of real estate⁷.

1 For the meaning of 'property' see PARA 4 note 4 ante. See also PARA 416 note 4 ante.

2 For the meaning of 'will' see PARA 3 note 1 ante.

3 *Re Feis, Guillaume v Ritz-Remorf* [1964] Ch 106, [1963] 3 All ER 303. See PARA 410 ante.

4 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 1. See also the cases cited in PARA 411 notes 2-6 ante. As to restrictions on the disposition of the matrimonial home if one spouse dies intestate leaving the other surviving see PARA 594 post. For the meaning of 'pecuniary legacy' see PARA 421 post.

5 *Re Lamb, Vipond v Lamb* [1929] 1 Ch 722; *Re Petty, Holliday v Petty* [1929] 1 Ch 726; *Re Worthington, Nichols v Hart* [1933] Ch 771, CA; *Re Sanger, Taylor v North* [1939] 1 Ch 238, [1938] 4 All ER 417.

6 *Re Tong, Hilton v Bradbury* [1931] 1 Ch 202 at 212, CA.

7 *Re Atkinson, Webster v Walter* [1930] 1 Ch 47.

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418. Property included in residuary gift.

The second class of property applicable in payment of debts and liabilities¹ is property² of the deceased not specifically devised or bequeathed but included, either by a specific or by a general description, in a residuary gift³ subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies⁴, so far as not provided for under the preceding paragraph⁵.

Accordingly, a fund must be set aside out of residue to satisfy pecuniary legacies, and since pecuniary legacies are still primarily payable out of personalty it will be set aside primarily out of personalty in the absence of a contrary intention⁶. The residue is divided notionally into two separate funds, the first to meet pecuniary legacies, and a second fund consisting of the balance of the residue. The second fund must be exhausted before the first is touched, so that the old rule by which debts and testamentary expenses were a first charge on the residuary personalty is displaced⁷.

1 See PARA 416 ante.

2 For the meaning of 'property' see PARA 4 note 4 ante.

3 Although all devises used to be regarded as specific, a general or universal gift of real estate is 'residuary' for this purpose: see *Re Wilson, Wilson v Mackay* [1967] Ch 53 at 68, [1966] 2 All ER 867 at 871 per Pennycuik J; and PARA 473 post.

4 For the meaning of 'pecuniary legacy' see PARA 421 post.

5 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 2. For decisions as to the effect of this provision see PARA 411 text and note 7 ante.

6 See PARAS 525-530 post. The creation of a mixed fund of realty and personalty out of which the legacies are to be paid can be an expression of a contrary intention: see PARA 529 post.

7 *Re Anstead, Gurney v Anstead* [1943] Ch 161 at 164, [1943] 1 All ER 522 at 524 per Uthwatt J; *Re Wilson, Wilson v Mackay* [1967] Ch 53 at 71, [1966] 2 All ER 867 at 873-874 per Pennycuik J.

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419. Property the subject of specific gifts.

The third class of property applicable in payment of debts and liabilities¹ is property² of the deceased specifically appropriated or devised or bequeathed, either by a specific or by a general description, for the payment of debts³. This must be read as referring to property other than property included in a residuary gift⁴.

1 See PARA 416 ante.

2 For the meaning of 'property' see PARA 4 note 4 ante.

3 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 3.

4 *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268 at 300, CA; and see PARA 418 ante.

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420. Property charged with payment of debts.

The fourth class of property applicable in payment of debts and liabilities¹ is property² of the deceased charged with³ or devised or bequeathed, either by a specific or by a general description, subject to a charge for the payment of debts⁴. This must be read as referring to property other than property included in a residuary gift⁵.

1 See PARA 416 ante.

2 For the meaning of 'property' see PARA 4 note 4 ante.

3 The effect for this purpose of a charge of debts is preserved, notwithstanding that under the Administration of Estates Act 1925 s 32(1) (see PARA 387 ante), the charge is no longer necessary: *Re Kempster, Kempster v Kempster* [1906] 1 Ch 446.

4 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 4. The statutory provision appears to be in accordance with the former law that if the personalty was exhausted legatees could come on the real estate charged with the payment of debts, whether expressly or by inference: see *Re Salt, Brothwood v Keeling* [1895]

2 Ch 203; *Re Roberts, Roberts v Roberts* [1902] 2 Ch 834, holding that *Re Bate, Bate v Bate* (1890) 43 ChD 600 was overruled.

5 *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268 at 300, CA; and see PARA 418 ante.

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421. Fund for pecuniary legacies.

The fifth class of property applicable in payment of debts and liabilities¹ is the fund, if any, retained to meet pecuniary legacies². 'Pecuniary legacy' includes an annuity, a general legacy, a demonstrative legacy so far as not discharged out of the designated property³ and any general direction by the testator for the payment of money, including all inheritance tax free from which any devise, bequest or payment is made to take effect⁴.

1 See PARA 416 ante.

2 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 5. Formerly, where the general personal estate was insufficient for the payment of debts and legacies, pecuniary legatees had no right to make the residuary devisee contribute rateably: see *Collins v Lewis* (1869) LR 8 Eq 708; *Dugdale v Dugdale* (1872) LR 14 Eq 234; *Tomkins v Colthurst* (1875) 1 ChD 626; *Farquharson v Floyer* (1876) 3 ChD 109.

3 For the meaning of 'property' see PARA 4 note 4 ante.

4 Administration of Estates Act 1925 s 55(1)(ix); Inheritance Tax Act 1984 s 273, Sch 6 para 1; Finance Act 1986 s 100(1).

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422. Property specifically devised or bequeathed.

The sixth class of property applicable in payment of debts and liabilities¹ is property² specifically devised or bequeathed³, rateably according to value⁴; but neither portions⁵ nor legacies⁶ charged on real estate are liable to contribute with the real estate or specific legacies. The value of the property is the value to the testator, and therefore, where real estate is devised subject to a mortgage and to the payment of legacies, the mortgage may be deducted from the value but not the legacies⁷.

1 See PARA 416 ante.

2 For the meaning of 'property' see PARA 4 note 4 ante.

3 If a testator confers upon a beneficiary an option to purchase shares forming part of the estate at a price below market value, but does not make a distinct bequest of the beneficial interest represented by the

difference between the option price and the market value, the beneficial interest in question is not property specifically bequeathed and has no place in the statutory order of application of assets; in such a case the property subject to the option is, it seems, the last to be available for the payment of debts: *Re Eve, National Provincial Bank Ltd v Eve* [1956] Ch 479, [1956] 2 All ER 321.

4 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 6. As to specific legacies see PARA 472 post. As to demonstrative legacies see PARA 474 post.

5 *Raikes v Boulton* (1860) 29 Beav 41; *Re Saunders-Davies, Saunders-Davies v Saunders-Davies* (1887) 34 ChD 482.

6 *Re John, Jones v John* [1933] Ch 370; *Re Bawden, National Provincial Bank of England v Cresswell, Bawden v Cresswell* [1894] 1 Ch 693.

7 See *Raikes v Boulton* (1860) 29 Beav 41; *Re Saunders-Davies, Saunders-Davies v Saunders-Davies* (1887) 34 ChD 482. The respective values must be ascertained as at the date of the testator's death: *Fielding v Preston* (1857) 1 De G & J 438. Where real estate subject to an incumbrance was specifically devised free from incumbrances so as to exclude the operation of Locke King's Acts (see PARA 414 note 3 ante), a pecuniary legatee was entitled to have recourse against the devised realty to the extent to which the incumbrance had been discharged out of the personal estate: *Re Smith, Smith v Smith* [1899] 1 Ch 365.

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THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN
ADMINISTRATION/(ii) Order in Payment of Debts and Liabilities/423. Property appointed.

423. Property appointed.

The seventh class of property applicable in payment of debts and liabilities¹ is property² appointed by will³ under a general power⁴, including the statutory power to dispose of entailed interests⁵, rateably according to value⁶. For such property to be available for payment of debts and liabilities the power must be actually exercised⁷.

1 See PARA 416 ante.

2 For the meaning of 'property' see PARA 4 note 4 ante.

3 For the meaning of 'will' see PARA 3 note 1 ante.

4 See *Fleming v Buchanan* (1853) 3 De GM & G 976 at 980; *Beyfus v Lawley* [1903] AC 411, HL. See also PARAS 372-373 ante. As to the exercise of a general power by will see PARA 532 post; and POWERS vol 36(2) (Reissue) PARA 310 et seq.

5 See the Law of Property Act 1925 s 176; and REAL PROPERTY vol 39(2) (Reissue) PARA 141. Although the creation of new entailed interests on or after 1 January 1997 is prohibited (see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARA 677), this power continues to be exercisable in relation to existing entails.

6 Administration of Estates Act 1925 s 34(3), Sch 1 Pt II para 7. This preserves the old rule as to property expressly appointed by will: see the cases cited under this head in PARA 430 note 1 post.

7 *Holmes v Coghill* (1802) 7 Ves 499; on appeal (1806) 12 Ves 206. As to powers generally see POWERS.

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THE ADMINISTRATION OF ASSETS/(4) ORDER OF APPLICATION OF ASSETS IN

ADMINISTRATION/(ii) Order in Payment of Debts and Liabilities/424. Interests charged with the payment of debts.

424. Interests charged with the payment of debts.

Where a person dies possessed of or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests¹), by his will² disposes of, an interest in property³ which, at the time of his death, is charged with the payment of money, whether by way of legal mortgage, equitable charge⁴ or otherwise⁵, including a lien for unpaid purchase money⁶, and the deceased has not by will, deed or other document signified a contrary or other intention⁷, the interest so charged is, as between the different persons claiming through the deceased, primarily liable for the payment of the charge, and every part of the interest bears, according to its value, a proportionate part of the charge on the whole⁸.

As this provision applies only to disputes between different persons claiming through the deceased, it is not applicable at the instance of a residuary legatee against a specific devisee, where the devised estate has been mortgaged to secure a partnership debt, and the partnership assets are sufficient to repay the advance⁹, or where the property specifically bequeathed has been charged with a debt and the testator is merely a surety for payment of the debt which is paid off by the principal debtor after the testator's death¹⁰, or to charges affecting an estate which descends to a tenant in tail under a settlement not made by the deceased¹¹.

1 See PARAS 372, 423 ante.

2 For the meaning of 'will' see PARA 3 note 1 ante.

3 For the meaning of 'property' see PARA 4 note 4 ante. Personalty did not come within the repealed enactments now replaced by the Administration of Estates Act 1925 s 35, and a legatee of personal estate of a testator subject to a mortgage was entitled, in the absence of a contrary intention, to have the mortgage debt discharged out of other parts of the estate: see *Knight v Davis* (1833) 3 My & K 358; *Bothamley v Sherson* (1875) LR 20 Eq 304; *Re Butler, Le Bas v Herbert* [1894] 3 Ch 250; *Re Chantrell, Sutcliffe v Von Liverhoff* [1907] WN 213; *Re Williams, Cunliffe v Williams* [1915] 1 Ch 450.

4 *Re Turner, Tennant v Turner* [1938] Ch 593, [1938] 2 All ER 560.

5 See eg *Re Riddell, Public Trustee v Riddell* [1936] Ch 747, [1936] 2 All ER 1600.

6 *Re Cockcroft, Broadbent v Groves* (1883) 24 ChD 94. See also PARA 414 ante.

7 As to what constitutes a contrary intention see PARA 426 post.

8 Administration of Estates Act 1925 s 35(1). Nothing in s 35 affects the right of a person entitled to the charge to obtain payment or satisfaction of it either out of the other assets of the deceased or otherwise: s 35(3). As to the enactments replaced by this provision see PARA 414 note 3 ante. The enactments replaced applied equally to next of kin as to legatees (*Re Fraser, Lowther v Fraser* [1904] 1 Ch 726, CA), but did not impose any personal liability on the devisee (*Syer v Gladstone* (1885) 30 ChD 614 at 616).

9 *Re Ritson, Ritson v Ritson* [1899] 1 Ch 128, CA.

10 *Re Hawkes, Reeve v Hawkes* [1912] 2 Ch 251.

11 *Re Anthony, Anthony v Anthony* [1893] 3 Ch 498. As to settlements see generally SETTLEMENTS.

ADMINISTRATION/(ii) Order in Payment of Debts and Liabilities/425. What constitutes a charge.

425. What constitutes a charge.

The statutory provisions as to interests charged with the payment of debts¹ apply to a statutory charge for inheritance tax², a collateral mortgage³, and formerly applied to a charge on land taken in execution under a writ of *elegit*⁴, but a general charge upon the real estate in aid of the personal estate to pay legacies or debts, or both, is not a charge within the enactment, as the object and intention of the provisions is not, in such a case, to alter the administration of assets or to make the real estate primarily liable to the exoneration of the general estate⁵.

1 See PARA 416 ante.

2 Or estate duty or capital transfer tax (see PARAS 58 note 5 ante, 546 note 2 post). See *Re Bowerman, Porter v Bowerman* [1908] 2 Ch 340. For the statutory charge for inheritance tax see the Inheritance Tax Act 1984 s 237 (as amended); and INHERITANCE TAXATION vol 24 (Reissue) PARA 683 et seq. What is referred to here is a charge for one of these taxes which arises before the deceased's death.

3 *Coleby v Coleby* (1866) LR 2 Eq 803.

4 *Re Anthony, Anthony v Anthony* [1892] 1 Ch 450. The writ of *elegit* has been abolished.

5 *Hepworth v Hill* (1862) 30 Beav 476 at 483 per Romilly MR.

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426. What constitutes a contrary intention.

A charge of or general direction for payment of debts upon or out of a testator's personal estate, or his residuary real and personal estate¹, or his residuary real estate is not a sufficient signification of a contrary or other intention²; the intention must be further signified by words expressly or by necessary implication referring to all or some part of the charge³. Accordingly, a direction to pay debts, except mortgage debts on Blackacre, out of the residue, is sufficient indication of an intention to throw on the residue a mortgage debt on Whiteacre⁴; the realty will also be exonerated if, in the direction to pay debts, a debt is included by a description sufficient to identify it as being a debt which happens to be secured by mortgage⁵; and a contrary intention is expressed by a direction to pay debts out of a special fund, not being one of the funds referred to above⁶. However, where a testator devises property which he has contracted to buy, a direction to pay out of residue 'sums of money secured on mortgage' does not throw on the residue the unpaid balances of the purchase money in respect of which the vendor has a lien on the property comprised in the contract for sale⁷. The contrary intention need not appear in the will; it may be gathered from the mortgage deeds themselves⁸, or from some other document⁹.

1 For the meaning of 'real estate' see PARA 3 note 1 ante.

2 Administration of Estates Act 1925 s 35(2)(a), (b), substantially reproducing the Real Estate Charges Act 1877 s 1 (repealed as respects deaths after 1925).

3 Administration of Estates Act 1925 s 35(2), substantially reproducing the Real Estate Charges Act 1867 s 1 (repealed as respects deaths after 1925). See also *Re Major, Taylor v Major* [1914] 1 Ch 278. As to the construction of the will see PARA 410 note 4 ante.

4 *Re Valpy, Valpy v Valpy* [1906] 1 Ch 531. A direction to pay the mortgage debt on Whiteacre out of the proceeds of sale of Blackacre does not enable the devisees of Whiteacre to go against the general estate for any deficiency: *Re Birch, Hunt v Thorn* [1909] 1 Ch 787, explaining *Allen v Allen* (1862) 30 Beav 395 at 403; and see *Re Fegan, Fegan v Fegan* [1928] Ch 45.

5 *Re Fleck, Colston v Roberts* (1888) 37 ChD 677.

6 *Re Fegan, Fegan v Fegan* [1928] Ch 45. If the special fund is insufficient, the property charged is not exonerated so as to throw the balance of the mortgage debt on the general personal estate: *Re Fegan, Fegan v Fegan* supra.

7 *Re Beirnsstein, Barnett v Beirnsstein* [1925] Ch 12; *Re Birmingham, Savage v Stannard* [1959] Ch 523 at 530, [1958] 2 All ER 397 at 401. See also PARA 414 ante.

8 See the Administration of Estates Act 1925 s 35(1) (see PARA 424 ante), substantially reproducing the Real Estate Charges Act 1854 s 1 (repealed as respects deaths after 1925); and *Re Campbell, Campbell v Campbell* [1893] 2 Ch 206.

9 A letter giving notice on the testator's part to pay off a mortgage in six months' time merely shows an intention by him to pay off the mortgage in his lifetime, and shows no intention that the debt should not be borne by the specific devisee: *Re Nicholson, Nicholson v Boulton* [1923] WN 251. A letter by the testator enclosing a cheque for the completion of a purchase shows merely his intention to pay the balance of the purchase money in his lifetime, and, if the testator dies before completion, the devisee takes the property subject to the vendor's lien: *Re Wakefield, Gordon v Wakefield* [1943] 2 All ER 29, CA. As to the vendor's lien see LIEN vol 68 (2008) PARA 859 et seq.

UPDATE

426 What constitutes a contrary intention

NOTE 3--See *Ross v Perrin-Hughes* [2004] EWHC 2559 (Ch), [2004] All ER (D) 159 (Nov).

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427. Several properties comprised in one charge.

Where several properties are comprised in one mortgage or charge and are devised or bequeathed to different persons, those persons must bear the debt rateably unless the will shows a contrary intention¹. The use of the word 'collateral' or the fact that one property was brought into charge subsequently on the occasion of a further advance does not indicate a contrary intention²; nor does the fact that property devised is subject to a conditional option for a third party to purchase at a price below the proportionate amount of the sum due³. Similarly a contrary intention is not indicated even after 1925⁴ by the fact that one of the properties passes under a residuary devise and one under a specific devise, although a specific devise now takes priority over a residuary devise⁵. A contrary intention may also be gathered from the language of the documents or the nature of the transaction if these indicate that one property was intended to form a primary security and the other a secondary security⁶.

1 See the Administration of Estates Act 1925 s 35(1) (see PARA 424 ante), substantially reproducing the Real Estate Charges Act 1854 s 1 (repealed as respects deaths after 1925). See also *Re Newmarch, Newmarch v Storr* (1878) 9 ChD 12 at 17, CA; *Re Major, Taylor v Major* [1914] 1 Ch 278. The same rule applies where freeholds and leaseholds and pure personalty are comprised in one mortgage: *Trestrail v Mason* (1878) 7 ChD 655; *Leonino v Leonino* (1879) 10 ChD 460. The rule applied before 1926 as between heir at law and next of kin in the case of intestacy: *Evans v Wyatt* (1862) 31 Beav 217. As to cases where the old rules of descent still apply see PARA 584 post.

2 *Re Athill, Athill v Athill* (1880) 16 ChD 211 at 225-226, CA, per Cotton LJ.

3 *Re Biss, Heasman v Biss* [1956] Ch 243, [1956] 1 All ER 89.

4 *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643 at 692, [1962] 2 All ER 335 at 361, CA, per Upjohn LJ; overruling on this point *Re Biss, Heasman v Biss* [1956] Ch 243, [1956] 1 All ER 89; and *Re Cohen, National Provincial Bank Ltd v Katz* [1960] Ch 179, [1959] 3 All ER 740.

5 See the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II paras 2, 3; and PARAS 418-419 ante.

6 Such an intention was found in *Lipscomb v Lipscomb* (1868) LR 7 Eq 501; *De Rochefort v Dawes* (1871) LR 12 Eq 540, but was not found in *Leonino v Leonino* (1879) 10 ChD 460; *Re Athill, Athill v Athill* (1880) 16 ChD 211, CA.

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428. Several properties comprised in separate mortgages.

Where several properties are comprised in separate mortgages, and the mortgage on one of the properties exceeds in amount the value of that property, the amount of the deficiency must be discharged out of the testator's general estate and not out of the surplus value of the other mortgaged properties¹; but a collective devise of lands of any tenure to the same set of persons prima facie throws the aggregate charges on to the aggregate lands in exoneration of the testator's general estate².

1 *Re Holt, Holt v Holt* (1916) 85 LJ Ch 779.

2 *Re Baron Kensington, Earl of Longford v Baron Kensington* [1902] 1 Ch 203.

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429. Liabilities incident to particular property before 1926.

At common law a liability which is naturally incident to any particular form of property must be borne by that property¹. Accordingly, a fine, incident to the preservation of a lease, must be paid by the person to whom the term is bequeathed²; and it has been held that the legatee of leasehold property which is out of repair is not entitled to have it put into repair at the expense of the testator's general estate³. Calls made subsequent to the death upon partly paid shares

must be paid by the legatee of the shares⁴. Before 1926 liabilities accrued due at the date of death, whether in respect of rent⁵ or in respect of calls made before death⁶, were payable, like other debts, out of the general personal estate⁷; but after 1925 the burden of liabilities in any way charged upon the particular property⁸ accrued due at the date of death must, subject to the terms of the will, be borne by the particular property to which the liabilities is naturally incident⁹.

1 See *Halliwell v Tanner* (1830) 1 Russ & M 633; *Re Butler, Le Bas v Herbert* [1894] 3 Ch 250.

2 *Fitzwilliams v Kelly* (1852) 10 Hare 266.

3 *Hickling v Boyer* (1851) 3 Mac & G 635; doubted in *Harris v Poyner* (1852) 1 Drew 174.

4 *Armstrong v Burnet* (1855) 20 Beav 424; *Addams v Ferick* (1859) 26 Beav 384. Distinguish from the ordinary case of partly paid shares such cases as *Blount v Hipkins* (1834) 7 Sim 43 at 51; *Jaques v Chambers* (1846) 16 Lj Ch 243; *Clive v Clive* (1854) Kay 600.

5 *Barry v Harding* (1844) 1 Jo & Lat 475.

6 *Addams v Ferick* (1859) 26 Beav 384.

7 *Re Timberlake, Archer v Timberlake* (1919) 63 Sol Jo 286; *Re Beecham, Woolley v Beecham* (1919) 63 Sol Jo 430.

8 Eg arrears of interest in a mortgage or calls upon shares where the articles give the company a lien for unpaid calls.

9 See the Administration of Estates Act 1925 s 35; and PARA 424 et seq ante.

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430. Personalty the primary fund before 1926.

In the case of death before 1926 the personal estate of a deceased person was the primary fund for the payment of his debts¹, but where a testator appropriated a specific portion of his personal estate for the payment of his debts, that portion was the primary fund for payment unless the residuary personal estate was undisposed of², and a testator might, of course, make his realty the primary fund for payment of his debts, or create a mixed fund for payment of his debts³.

1 *Walker v Jackson* (1743) 2 Atk 624; *Duke of Ancaster v Mayer* (1785) 1 Bro CC 454. The order of abatement was as follows:

(1) the general or residuary personalty, not exonerated or exempted (see eg *Manning v Spooner* (1796) 3 Ves 114 at 117; *Harmood v Oglander* (1803) 8 Ves 106 at 124 (where a share of the residuary personalty lapsed, the debts were not payable primarily out of the lapsed share (see eg *Blann v Bell* (1877) 7 ChD 382)));

(2) real estate specifically appropriated to or devised in trust for payment of debts (see eg *Milnes v Slater* (1803) 8 Ves 295 at 304; *Stead v Hardaker* (1873) LR 15 Eq 175);

(3) real estate descended (see eg *Barber v Wood* (1877) 4 ChD 885);

(4) real estate devised, charged with the payment of debts (*Aldrich v Cooper* (1803) 8 Ves 382 at 396; *Re Stokes, Parsons v Miller* (1892) 67 LT 223; and see PARA 421 note 2 ante (where a share of realty charged with payment of debts lapsed, the lapsed share bore only its rateable proportion of the debts (*Ryves v Ryves* (1871) LR 11 Eq 539)));

(5) general pecuniary legacies rateably (see PARA 421 note 2 ante);

(6) real estate devised, whether specifically or as residue, and personal estate specifically bequeathed rateably (see eg *Powell v Riley* (1871) LR 12 Eq 175; *Jackson v Pease* (1874) LR 19 Eq 96; and see the cases cited in PARA 422 notes 5-7 ante);

(7) real and personal property expressly appointed by will in exercise of a general power of appointment (see eg *Fleming v Buchanan* (1853) 3 De GM & G 976; *Beyfus v Lawley* [1903] AC 411, HL (where the power was executed by reason of a bequest of the testator's personal estate, or of any bequest of personal property described in a general manner, personal property the subject of the general power was included in the bequest (see the Wills Act 1837 s 27 (as amended))); it formed part of the testator's personal estate, and therefore went in exactly the same way as his other personal estate, and was not necessarily postponed, as a fund liable for the payment of his debts, to other assets of the testator (*Williams v Williams, Re Hartley, Williams v Jones* [1900] 1 Ch 152); see also PARA 423 note 7 ante)).

2 *Browne v Groombridge* (1819) 4 Madd 495; *Choat v Yeats* (1819) 1 Jac & W 102; *Hewett v Snare* (1847) 1 De G & Sm 333; *Lomax v Lomax* (1849) 12 Beav 285; *Newbegin v Bell* (1857) 23 Beav 386; *Trott v Buchanan* (1885) 28 ChD 446; *Re Smith, Smith v Smith* [1913] 2 Ch 216 at 223; *Re Littlewood, Clark v Littlewood* [1931] 1 Ch 443 at 445.

3 See PARA 410 ante.

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431. Where realty the primary fund before 1926.

In order to make the realty the primary fund, it was necessary for a testator before 1926 to use language which showed a manifest intention that his personal estate should be exonerated¹. An express charge of debts upon his realty², or an express devise of his realty in trust for payment of debts³, was in itself insufficient to displace the ordinary rule that the personal estate was the primary fund; the charge or trust was treated as the constitution merely of an auxiliary fund for payment of debts, and the ordinary rule was only displaced where from the rest of the will it could be clearly gathered that the testator intended to exonerate his personal estate⁴.

1 *Bootle v Blundell* (1815) 1 Mer 193 at 219-220 per Lord Eldon LC; *Bickham v Cruttwell* (1838) 3 My & Cr 763; *Forrest v Prescott* (1870) LR 10 Eq 545 at 549 per Malins V-C; *Re Meere, Kilford v Blaney* (1885) 31 ChD 56 at 62, CA, per Lord Halsbury LC; *Re Smith, Smith v Smith* [1913] 2 Ch 216; *Re Littlewood, Clark v Littlewood* [1931] 1 Ch 443. As to the presumption in favour of giving creditors a charge on the larger amount of property see PARA 410 note 4 ante.

2 *Tait v Lord Northwick* (1799) 4 Ves 816 at 823; *Re Banks, Banks v Busbridge* [1905] 1 Ch 547.

3 *McClelland v Shaw* (1805) 2 Sch & Lef 538; *Rhodes v Rudge* (1826) 1 Sim 79.

4 For cases in which the personal estate was held to be exonerated see *Burton v Knowlton* (1796) 3 Ves 107; *Bootle v Blundell* (1815) 1 Mer 193; *Greene v Greene* (1819) 4 Madd 148; *Michell v Michell* (1820) 5 Madd 69; *Lance v Aglionby* (1859) 27 Beav 65; *Gilbertson v Gibertson* (1865) 34 Beav 354; *Forrest v Prescott* (1870) LR 10 Eq 545; *Re Meere, Kilford v Blaney* (1885) 31 ChD 56, CA; *Duffy v Duffy* [1920] 1 IR 122. For cases in which the personal estate was held not to be exonerated see *French v Chichester* (1706) 2 Vern 568; *Haslewood v Pope* (1734) 3 P Wms 322; *Duke of Ancaster v Mayer* (1785) 1 Bro CC 454; *Tait v Lord Northwick* (1799) 4 Ves

816; *M'Clelland v Shaw* (1805) 2 Sch & Lef 538; *Brummel v Prothero* (1796) 3 Ves 111; *Aldridge v Lord Wallscourt* (1810) 1 Ball & B 312; *Tower v Lord Rous* (1811) 18 Ves 132; *Rhodes v Rudge* (1826) 1 Sim 79; *Trott v Buchanan* (1885) 28 ChD 446; *Re Banks, Banks v Busbridge* [1905] 1 Ch 547; *Walker v M'Kay* [1917] 1 IR 278, CA.

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(iii) Testamentary and Administration Expenses

432. The general principle.

It is often important to decide whether costs and expenses incurred by a personal representative are properly payable out of the estate as testamentary and administration expenses¹ or should be borne by the legatees or devisees or persons entitled on intestacy out of their respective interests. The general principle is that the estate must bear the expenses incident to the proper performance of the duties of the personal representative² as personal representative but not the expenses involved in the execution of trusts which arise after the estate has been administered or an assent given³, or the expenses of clearing the property comprised in a gift so as to make it available by way of assent in favour of the donee⁴.

1 See PARA 416 ante.

2 *Sharp v Lush* (1879) 10 ChD 468, where it was said that 'executorship expenses' and 'testamentary expenses' meant the same thing; *Re Clemow, Yeo v Clemow* [1900] 2 Ch 182 at 190.

3 *Re Fitzpatrick, Bennett v Bennett* [1952] Ch 86, [1951] 2 All ER 949; cf *Lord Brougham v Lord Poulett* (1855) 19 Beav 119, where a fund was directed to be set aside to pay debts, legacies, funeral expenses, expenses of proving the will 'and the execution of the trusts thereof', and it was held that in the context the last-mentioned expenses were limited to expenses properly payable by the executors as such. See also *Re Evans, Evans v Westcombe* [1999] 2 All ER 777, where expenses incurred in respect of a missing beneficiary policy were allowed as an administration expense. As to assents see also PARA 568 post.

4 *Re Matthews' Will Trusts, Bristow v Mathews* [1961] 3 All ER 869 at 876, [1961] 1 WLR 1415 at 1422 per Pennycook J.

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433. General costs of administration.

The general costs of administering the estate are testamentary expenses, for this term is not confined to expenses connected with the will, and indeed it applies to an intestacy¹. The estate must therefore bear the cost of obtaining the grant², collecting and preserving the assets, discharging the debts and distributing the balance³. The insurance premium for a missing beneficiary policy can be a proper testamentary expense⁴. It seems that the cost of moving and

storing objects specifically bequeathed before and after the executor assents to the bequest is borne by the legatee⁵.

1 *Sharp v Lush* (1879) 10 ChD 468; *Re Clemow, Yeo v Clemow* [1900] 2 Ch 182.

2 *Re Elementary Education Acts 1870 and 1873* [1909] 1 Ch 55, CA.

3 *Sharp v Lush* (1879) 10 ChD 468. The cost of distribution may include the cost of obtaining legal advice, without commencing proceedings, as to the proper distribution of the estate: *Sharp v Lush* supra at 471.

4 *Re Evans, Evans v Westcombe* [1999] 2 All ER 777.

5 *Re De Sommers, Coelenbier v De Sommers* [1912] 2 Ch 622; *Re Pearce, Crutchley v Wells* [1909] 1 Ch 819; *Re Grosvenor, Grosvenor v Grosvenor* [1916] 2 Ch 375; *Re Sivewright, Law v Fenwick* [1922] WN 338; *Re Leach, Milne v Daubeney* [1923] 1 Ch 161; *Re Scott, Scott v Scott* [1915] 1 Ch 592, CA; *Re Fitzpatrick, Bennett v Bennett* [1952] Ch 86, [1951] 2 All ER 949. See also PARA 483 text and notes 4-5 post. The expenses of preserving chattels pending exercise of a right of selection are a testamentary expense, however: *Re Collins Settlement Trusts, Donne v Hewetson* [1971] 1 All ER 283, [1971] 1 WLR 37.

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434. Fees of the Public Trustee and trust corporations.

The acceptance and withdrawal fees of the Public Trustee¹ or trust corporations in respect of an annuity are borne by the estate where the residue of the estate has been given subject to payment of the annuity², but where funds are set aside to secure annuities and do not then fall into residue the withdrawal fee must be borne by those funds and not by residue³. Similarly the acceptance fee in respect of a settled legacy is paid by the estate but the withdrawal fee is paid out of the legacy⁴. Income fees are payable out of income⁵ and must be borne by the income of a settled legacy⁶ or, in case of an annuity, out of the funds set aside to secure the annuity⁷ or the residuary estate⁸ as the case may be.

1 As to the Public Trustee see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq.

2 *Re Hulton, Midland Bank Executor and Trustee Co Ltd v Thompson* [1936] Ch 536, [1936] 2 All ER 207; *Re Riddell, Public Trustee v Riddell* [1936] Ch 747, [1936] 2 All ER 1600; cf *Re Bentley, Public Trustee v Bentley* [1914] 2 Ch 456.

3 *Re Godwin, Coutts & Co v Godwin* [1938] Ch 341, [1938] 1 All ER 287; *Re Evans' Will Trusts, Public Trustee v Gausby* [1948] Ch 185, [1948] 1 All ER 381.

4 *Re Roberts' Will Trusts, Younger v Lewins* [1937] Ch 274, [1937] 1 All ER 518.

5 *Re Hicklin, Public Trustee v Hoare* [1917] 2 Ch 278; *Re Riddell, Public Trustee v Riddell* [1936] Ch 747, [1936] 2 All ER 1600.

6 *Re Roberts' Will Trusts, Younger v Lewins* [1937] Ch 274, [1937] 1 All ER 518.

7 *Re Godwin, Coutts & Co v Godwin* [1938] Ch 341, [1938] 1 All ER 287; *Re Evans' Will Trusts, Public Trustee v Gausby* [1948] Ch 185, [1948] 1 All ER 381.

8 *Re Hulton, Midland Bank Executor and Trustee Co Ltd v Thompson* [1936] Ch 536, [1936] 2 All ER 207.

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435. Inheritance tax and capital gains tax.

Inheritance tax payable in respect of the deceased person's death on property situated in the United Kingdom¹ which vests in the personal representatives² is treated as a testamentary expense³, unless the deceased showed a contrary intention in his will⁴.

Capital gains tax on death is no longer payable⁵. Capital gains tax due from the deceased during his lifetime would be payable as an ordinary debt or liability of his estate.

1 Foreign death duties or taxes are not normally a testamentary expense, and are usually borne by specific legatees of the property subject to them: *Re Scott, Scott v Scott* [1915] 1 Ch 592, CA; *Re Brewster, Butler v Southam* [1908] 2 Ch 365; *Re De Sommers, Coelenbier v De Sommers* [1912] 2 Ch 622; *Shelley v New South Wales Institution for Deaf and Dumb and Blind* [1919] AC 650, PC; *Re Matthews' Will Trusts, Bristow v Matthews* [1961] 3 All ER 869 at 876, [1961] 1 WLR 1415 at 1422 per Pennycuik J. See, however, *Re Sebba, Lloyd's Bank Ltd v Hutson* [1959] Ch 166, [1958] 3 All ER 393, where certain Canadian duties were held to be payable out of residue without the pecuniary legacies being subject to them, and where the double tax relief was allocated to the beneficiaries who bore the United Kingdom estate duty on the assets entitled to the relief. United Kingdom inheritance tax on property situated outside the United Kingdom is not treated as a testamentary expense (see the Inheritance Tax Act 1984 s 211(1); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651) and is borne by that property: *Re Scull, Scott v Morris* (1917) 87 LJCh 59, CA; *Re Sebba, Lloyd's Bank Ltd v Hutson* supra. As to the incidence of inheritance tax see also PARA 546 et seq post.

2 Ie other than property comprised in a settlement immediately before the deceased's death (see the Inheritance Tax Act 1984 s 211(1)), so that, for example, the inheritance tax on settled land or on settled property subject to a general power exercised by the deceased would not be treated as a testamentary expense, even though such property became vested in the personal representatives. See also INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

3 See *ibid* s 211(1); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651. Where any amount of inheritance tax paid by personal representatives does not fall to be borne as part of the testamentary expenses of the estate, that amount, where occasion requires, is to be repaid to them by the person in whom the property to which the tax is attributable is vested: see s 211(3); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

4 *Ibid* s 211(2). A direction freeing from inheritance tax property which would otherwise bear its own inheritance tax is treated as a pecuniary legacy by the Administration of Estates Act 1925: see PARA 421 ante.

5 See the Taxation of Chargeable Gains Act 1992 s 62(1); and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 106.

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436. Costs of proceedings.

Costs of proceedings are in the discretion of the court¹, but the discretion is a judicial one exercised on the following principles. The executor's costs of probate proceedings are testamentary expenses and therefore payable out of the estate², and the costs of other parties

may be, but are not necessarily also allowed³. The executor's costs of proceedings for directions or the construction of the will or administration of the estate by the court are testamentary expenses and, if the fault is the testator's, the costs of all necessary parties⁴ will be payable out of the estate⁵, even if only one particular fund is concerned⁶.

1 See PARAS 327 ante, 746 post.

2 See PARAS 328-329 ante.

3 See PARAS 328, 330 ante.

4 As to unnecessary parties or parties whose claims are without merit see *Re Amory, Westminster Bank Ltd v British Sailors' Society Inc at Home and Abroad* [1951] 2 All ER 947n; *Re Daysh, Dale v Duke of Richmond* [1951] 1 TLR 257; *Re Preston, Raby v Port of Hull Society's Sailors' Orphans Homes* [1951] Ch 878, [1951] 2 All ER 421.

5 *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406; *Morrell v Fisher* (1851) 4 De G & Sm 422; *Harloe v Harloe* (1875) LR 20 Eq 471; *Re Clarke, Clarke v St Mary's Convalescent Home* (1907) 97 LT 707; *Miles v Harrison* (1874) 9 Ch App 316; *Re Young, Young v Dolman* (1881) 44 LT 499, CA; *Penny v Penny* (1879) 11 ChD 440; *Re Groom, Booty v Groom* [1897] 2 Ch 407; *Re Vincent, Rohde v Palin* [1909] 1 Ch 810; *Re Hall-Dare, Le Marchant v Lee Warner* [1916] 1 Ch 272.

6 *Re Flecher, King v King* (1918) 62 Sol Jo 740. As to the costs of administration proceedings see further PARA 746 et seq post.

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437. Right of indemnity.

The personal representative is entitled to be indemnified out of the estate for all proper expenses incurred in relation to it, without any special provision to that effect¹. This right of indemnity is a first charge as well upon the income as upon the capital of the estate, and the expenses may be retained out of the income until provision can be made for raising them out of the capital². The charges and expenses include the costs of probate proceedings³, and of claims relating to the estate, which were brought or defended with the leave of the court, or which, though no leave had been obtained, it was proper to bring or defend⁴. Should the representative desire to have his costs assessed by a costs judge against the estate, he should obtain an express direction to that effect in the order for the detailed assessment of his costs, charges and expenses⁵.

A personal representative who has improperly brought or defended proceedings will be disallowed as against the estate both his solicitor's bill of costs in the proceedings and the costs he has had to pay to his opponent⁶.

1 See the Trustee Act 1925 ss 30(2), 68(1) PARA (17), 69(1); and TRUSTS vol 48 (2007 Reissue) PARA 902 et seq. See also *A-G v Norwich Corp'n* (1837) 2 My & Cr 406 at 424; and PARA 5 ante. As to the right to indemnity for loss occasioned by co-representatives see PARA 799 post; and as to costs see PARA 746 et seq post.

2 *Stott v Milne* (1884) 25 ChD 710, CA.

3 *Re Price, Williams v Jenkins* (1886) 31 ChD 485; *Graham v M'Cashin* [1901] 1 IR 404, CA. As to costs of probate proceedings generally see PARA 327 ante.

4 *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, CA; *Re England's Settlement Trusts, Dobb v England* [1918] 1 Ch 24. See PARA 746 text and note 11 post. As to notices for claims see PARA 382 ante. See also *Evans v Evans* [1985] 3 All ER 289, [1986] 1 WLR 101, CA (distinguishing *Re Dallaway* [1982] 3 All ER 118, [1982] 1 WLR 756), which held that it is not appropriate for the personal representative to be indemnified out of the estate against the costs of defending a claim to beneficial entitlement to the whole estate, where all the beneficiaries are of full age and capacity.

5 See *Payne v Little* (1859) 27 Beav 83.

6 *Chambers v Smith* (1846) 2 Coll 742; varied on another point sub nom *Smith v Chambers* (1847) 2 Ph 221. As to the right of the personal representative to the court's guidance see PARA 713 post; and as to the expediency of obtaining such guidance in bringing or defending hostile actions see PARAS 746, 811 post.

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(5) TRUSTS AND POWERS OF THE REPRESENTATIVE

(i) Trusts and Powers generally

438. Statutory powers.

With effect from 1 January 1997, in addition to any powers and discretions conferred by the will, the personal representatives¹ of a person whatever his date of death², in dealing with his real and personal estate³, for purposes of administration⁴, or during a minority of any beneficiary or the subsistence or any life interest, or until the period of distribution arrives⁵, have: (1) as respects the personal estate, the same powers and discretions, including power to raise money by mortgage or charge (whether or not by deposit of documents), as a personal representative had before 1926 with respect to personal estate vested in him⁶; and (2) as respects the real estate, all the functions conferred on them by Part I of the Trusts of Land and Appointment of Trustees Act 1996⁷. In the exercise of his powers a personal representative or trustee is expected to act gratuitously unless the will or the court makes provision for his remuneration⁸.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 Administration of Estates Act 1925 s 39(3).

3 For the meaning of 'real estate' see PARA 3 note 1 ante.

4 For the meaning of 'administration' see PARA 3 note 1 ante.

5 Administration of Estates Act 1925 s 39(1). See *Re Trollope's Will Trusts, Public Trustee v Trollope* [1927] 1 Ch 596 at 605; and PARA 569 post.

6 Administration of Estates Act 1925 s 39(1)(i) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25, Sch 3 para 6, Sch 4). As to these powers see PARA 440 et seq post.

7 Administration of Estates Act 1925 s 39(1)(ii) (substituted by Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 6). As to the trust which arises on an intestacy see PARA 555 et seq post. For restrictions on the disposition of the matrimonial home if one spouse dies intestate leaving the other surviving see PARA 593 post. The functions under the Trusts of Land and Appointment of Trustees Act 1996 include all the powers of an absolute owner: see ss 6(1), 18; and TRUSTS vol 48 (2007 Reissue) PARA 1035. The other functions conferred by Pt I (ss 1-18) on personal representatives are: power to postpone sale where there is a trust for sale (see s 4(1)), power to convey land to beneficiaries of full age and capacity who are absolutely entitled to it (see s 6(2)), power to purchase a legal estate in any land in England and Wales for investment, occupation by a beneficiary, or for any other reason (see ss 6(3), (4), 17), power to partition land among beneficiaries of full age and

absolutely entitled (see s 7), power to delegate functions to beneficiaries by power of attorney (see s 9), and regulation of the rights of occupation of beneficiaries (see s 13): see s 18. If the administration of the estate is followed by trusteeship (see PARAS 569-570 post) these functions will continue and s 10 (consents to exercise of functions by trustees) and s 14 (powers of court) will then apply, as will also s 11 (duty to consult beneficiaries) in certain circumstances: see PARA 439 note 5 post. As to the personal representatives' duties in exercising their powers see PARA 439 post.

Before 1 January 1997, in relation to real estate personal representatives had all the powers, discretions and duties conferred or imposed by law and by statute on trustees holding land upon an effectual trust for sale: see the Administration of Estates Act 1925 s 39(1)(ii), (iii) (as originally enacted) (with effect from 1 January 1926). The statutory powers of trustees for sale were all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act 1925: see the Law of Property Act 1925 s 28(1) (as amended) (repealed with effect from 1 January 1997 by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4). As to this provision, and as to the powers so applied and the powers of trustees for sale in general see REAL PROPERTY vol 39(2) (Reissue) PARA 67; SETTLEMENTS vol 42 (Reissue) PARA 609.

8 See PARA 38 et seq ante.

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439. Personal representatives' duties in exercising powers.

It is the duty of personal representatives to hold an even hand between all the beneficiaries of the estate¹. On the one hand they must not unduly delay the payment or provision of any of the legacies, but on the other they ought not to sacrifice the interests of persons entitled in remainder by realising the estate for the benefit of a pecuniary legatee at an inopportune time when the value of securities is low. They must act prudently and properly in the management of the estate as a whole². Accordingly, it is not the duty of an executor to agree a valuation for inheritance tax at the highest price which might be obtained so as to make a beneficiary who had an option to purchase at that valuation pay the highest price³. The court will not in general interfere with the exercise of a discretion⁴, but may do so when beneficiaries are absolutely entitled between them, to ensure that their unanimous wishes are complied with⁵.

1 This includes persons entitled or potentially entitled as statutory beneficiaries under the family provision legislation: see PARA 667 post. Where there is land in the estate, in exercising the powers conferred by the Trusts of Land and Appointment of Trustees Act 1996 s 6 (see PARA 438 note 7 ante) personal representatives and trustees are to have regard to the rights of the beneficiaries: s 6(5). See also note 5 infra. As to the duty of personal representatives to hold a fair balance between capital and income in defraying expenditure in cases (before 1 January 1997) where by virtue of Law of Property Act 1925 s 28 (repealed with effect from 1 January 1997 by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4), and the Administration of Estates Act 1925 s 39(1) (as originally enacted), the powers both of a tenant for life and of the trustees of a settlement were vested in them see *Re Lord Boston's Will Trusts*, *Inglis v Lord Boston* [1956] Ch 395, [1956] 1 All ER 593; and PARA 438 note 7 ante. As to the self-dealing rule and exercise of powers see PARA 449 post.

2 See *Re Lepine*, *Dowsett v Culver* [1892] 1 Ch 210 at 219, CA; *Re Charteris*, *Charteris v Biddulph* [1917] 2 Ch 379 at 388, 397, CA.

3 *Re Hayes' Will Trusts*, *Pattinson v Hayes* [1971] 2 All ER 341, [1971] 1 WLR 758 (an estate duty case).

4 *Re Whichelow*, *Bradshaw v Orpen* [1953] 2 All ER 1558, [1954] 1 WLR 5.

5 *Butt v Kelson* [1952] Ch 197, [1952] 1 All ER 167, CA. If the administration of the estate is followed by trusteeship (see PARAS 569-570 post) the trustees must in exercise of any function relating to land, so far as practicable, consult the beneficiaries of full age with interests in possession in the land, and must, so far as consistent with the general interest of the trust, give effect to their wishes or the wishes of the majority, according to the value of their combined interests: Trusts of Land and Appointment of Trustees Act 1996 s 11(1). This duty, however, only applies if the trust arises by statute (eg under an intestacy or statutory joint tenancy or

tenancy in common) or under a will made on or after 1 January 1997 which does not exclude it: s 11(2). For the powers of beneficiaries who are together absolutely entitled to the trust property to substitute new trustees see ss 19-21; and TRUSTS vol 48 (2007 Reissue) PARA 897 et seq.

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(ii) Power to Alienate and Charge

440. Particular powers.

The powers of the personal representative¹ which have already been generally stated² include, for the purposes previously stated³, in particular the power on intestacy to charge the assets or sell leaseholds for the purpose of paying to one of the next of kin his share in the estate⁴; the statutory power of sale of any real or personal estate as to which the deceased died intestate⁵; in relation to the personal estate, the same power to raise money by mortgage or charge, whether or not by deposit of documents, as a personal representative had before 1926⁶ with respect to personal estate vested in him⁷; the power by a conveyance of a legal estate in land to a purchaser for money or money's worth to overreach equitable interests and powers⁸; and all the powers necessary so that every contract entered into by a personal representative is binding on and enforceable against and by the personal representative for the time being of the deceased and may be carried into effect or be varied or rescinded by him, and in the case of a contract entered into by a predecessor as if it had been entered into by himself⁹.

1 'Personal representative' does not include trustees in the ordinary sense: *Re Trollope's Will Trusts, Public Trustee v Trollope*[1927] 1 Ch 596 at 603.

2 See PARA 438 ante.

3 See PARA 438 ante.

4 *Re O'Donnell*[1905] 1 IR 406, CA; *Re Norwood and Blake's Contract*[1917] 1 IR 172.

5 Administration of Estates Act 1925 s 33(1) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 5). For the meaning of 'real estate' see PARA 3 note 1 ante. For the meaning of 'intestate' see PARA 555 note 1 post. Before 1 January 1997, the Administration of Estates Act 1925 s 33(1) (as originally enacted) provided for a trust for sale of an intestate estate with power to postpone sale.

6 See PARAS 442-443 post.

7 See the Administration of Estates Act 1925 s 39(1)(i) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25, Sch 3 para 6, Sch 4). See also PARA 438 ante.

8 See the Law of Property Act 1925 s 2(1)(iii); and REAL PROPERTY vol 39(2) (Reissue) PARA 250.

9 Administration of Estates Act 1925 s 39(1)(iii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 6). Nothing in the Administration of Estates Act 1925 s 39 (as amended) affects the right of any person to require an assent or conveyance to be made: s 39(2). For the meaning of 'conveyance' see PARA 267 note 1 ante. As to assents see PARA 559 et seq post. As to the contract for the sale of, and conveyance or transfer of, real estate where there are two or more representatives see s 2(2) (as amended); and PARA 443 post.

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441. Additional powers.

In addition to the powers stated previously¹, the personal representative has the following powers: (1) with respect to real estate vested in him², he has the same powers of alienation as a personal representative had at common law with respect to chattels real³; (2) for the purpose of paying inheritance tax for which he is liable⁴, or raising the amount of it when paid, and whether or not the property to which the tax is attributable is vested in him, to raise the amount of the tax by sale or mortgage of, or a terminable charge on, that property or any part of it⁵; (3) for giving effect to beneficial interests, he may limit or demise land for a term of years absolute, with or without impeachment for waste, to trustees on usual trusts for raising or securing any principal sum and interest on it for which the land, or any part of it, is liable, and may limit or grant a rentcharge for giving effect to any annual or periodical sum for which the land or its income, or any part of it, is liable⁶; (4) where he is authorised to pay or apply capital money subject to a trust for any purpose or in any manner, he has power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession⁷; (5) before giving an assent or making a conveyance in favour of any person entitled, he may permit that person to take possession⁸ of the land, and such possession does not prejudicially affect the representative's right to take or resume possession, nor his power to convey the land as if he were in possession of it but subject to the interest of any lessee, tenant or occupier in possession or in actual occupation of the land⁹.

1 See PARA 440 ante.

2 As to what real estate devolves on the personal representative see the Administration of Estates Act 1925 ss 1(1), 3(1), (2); and PARA 363 ante. 'Real estate' for this purpose includes leaseholds: see PARA 364 ante.

3 See *ibid* s 2(1); and PARA 363 ante.

4 As to the personal representatives' liability for inheritance tax see PARAS 766, 802 post.

5 Inheritance Tax Act 1984 s 212(1). See INHERITANCE TAXATION vol 24 (Reissue) PARA 652.

6 Administration of Estates Act 1925 s 40(1). This provision applies whenever the testator or intestate died: s 40(2). As to limited legal estates and their conversion in 1925 see the Law of Property Act 1925 s 39, Sch 1 Pt I; and REAL PROPERTY vol 39(2) (Reissue) PARA 50.

7 See the Trustee Act 1925 s 16(1); and TRUSTS vol 48 (2007 Reissue) PARA 1055. This provision applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust: see s 16(2).

8 'Possession' includes the receipt of rents and profits or the right to receive the same if any: Administration of Estates Act 1925 s 55(1)(xii).

9 *Ibid* s 43(1). This provision applies whatever the date of death of the testator or intestate: s 43(3).

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442. Power to alienate personalty.

The personal representative has and always had a complete and absolute control over the deceased's personal property, and, at any time before he has assented, he can dispose of the effects, whether they are legal or equitable¹, by mortgage or pledge as well as by sale², notwithstanding that the property disposed of is specifically bequeathed³ or limited in trust by the will⁴. He may give the mortgagee a power of sale over the mortgaged assets⁵.

One of several personal representatives⁶ can enter into a binding contract for sale of personality forming part of the deceased's estate⁷. If the representative who entered into the contract purported to do so not only on his own behalf but also on behalf of his co-representative and his co-representative did not authorise him to do so and has not subsequently ratified his act, the court may refuse to enforce the contract⁸. It appears, however, that the court may enforce the contract, even if the co-representative dissents, where the representative who entered into the contract in terms contracted solely on his own behalf without purporting to act with the concurrence of the co-representative⁹.

1 *Nugent v Gifford* (1738) 1 Atk 463 at 464. A transfer by a personal representative of his deceased's interest in a limited company is, although he is not himself a member of the company, as valid as if he had been a member: see the Companies Act 1985 s 183(3); and COMPANIES vol 14 (2009) PARAS 398, 434. As to the power of an attorney administrator to make title to property see PARA 208 ante.

2 *Mead v Lord Orrery* (1745) 3 Atk 235 at 240; *Scott v Tyler* (1788) 2 Dick 712 at 725; *M'Leod v Drummond* (1810) 17 Ves 152 at 154; *Earl Vane v Rigden* (1870) 5 Ch App 663.

3 *Ewer v Corbet* (1723) 2 P Wms 148; *Langley v Earl of Oxford* (1748) Amb 795; *Andrew v Wrigley* (1792) 4 Bro CC 125.

4 *M'Leod v Drummond* (1810) 17 Ves 152.

5 *Russell v Plaise* (1854) 18 Beav 21; *Cruikshank v Duffin* (1872) LR 13 Eq 555. See also *Thorne v Thorne* [1893] 3 Ch 196.

6 Apart from statute a single executor has power to dispose of the deceased's personal estate: see *Jacomb v Harwood* (1751) 2 Ves Sen 265 at 267; *Simpson v Gutteridge* (1816) 1 Madd 609 at 617; *Fountain Forestry Ltd v Edwards* [1975] Ch 1 at 11, [1974] 2 All ER 280 at 283 per Brightman J; cf *Turner v Hardey* (1842) 9 M & W 770. In *Fountain Forestry Ltd v Edwards* supra at 14 and 285, Brightman J thought that there was no decisive authority on the question whether an administrator acting without his co-administrator had the same power of disposition as an executor acting without his co-executor, but, having regard to dicta of Romilly MR in *Smith v Everett* (1859) as reported in 29 LJ Ch 236 at 239-240, in favour of a single administrator, he was content to assume for the purposes of the case before him that a single administrator had such power; see also PARA 345 text and note 4 ante.

7 *Fountain Forestry Ltd v Edwards* [1975] Ch 1, [1974] 2 All ER 280. The case concerned a contract for the sale of land before the amendment of the Administration of Estates Act 1925 s 2(2) by the Law of Property (Miscellaneous Provisions) 1994 s 16, with effect from 1 July 1995, required all personal representatives to join in a contract to sell land (see PARA 443 post), but it remains relevant to personal estate.

8 *Sneesby v Thorne* (1855) 7 De GM & G 399; *Fountain Forestry Ltd v Edwards* [1975] Ch 1, [1974] 2 All ER 280.

9 *Fountain Forestry Ltd v Edwards* [1975] Ch 1 at 15, [1974] 2 All ER 280 at 286 per Brightman J. See also 124 NLJ 749 (8 August 1974).

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443. Alienation of land.

Where there are two or more personal representatives¹ a conveyance² of real estate³, devolving under the provisions relating to the devolution of real estate⁴, or a contract for such a conveyance, may not be made without the concurrence of all the personal representatives or a court order⁵. If, however, probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate or contract for such a conveyance may be made by the proving executor or executors for the time being, without a court order, and is as effectual as if all the persons named as executors had concurred in it⁶.

Apart from statute, where an executor is selling or mortgaging real estate devised to himself and charged with the payment of legacies only, the assignee is bound to see to the application of the purchase money⁷. Where, however, the real estate is charged with payment of debts as well as of legacies, the assignee is under no such obligation, even though there are, to his knowledge, no debts of the testator existing⁸, or though the purchase money is expressed to be raised for the payment of legacies only⁹.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 For the meaning of 'conveyance' see PARA 267 note 1 ante.

3 For the meaning of 'real estate' see PARA 364 ante.

4 Ie under the Administration of Estates Act 1925 Pt I (ss 1-3) (as amended) (see PARA 363 et seq ante): see s 2(2) (as amended: see note 5 infra).

5 Ibid s 2(2) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 16(1), 21(2), Sch 2). See also *Johnson v Clarke* [1928] Ch 847. As to joint representation see generally para 345 ante. Before the amendment of Administration of Estates Act 1925 s 2(2), with effect from 1 July 1995, the concurrence of all the personal representatives was needed for a conveyance of real estate, but, as in the case of personal estate (see PARA 442 ante), not for a contract to convey it.

6 Ibid s 2(2) (as amended: see note 5 supra).

7 *Horn v Horn* (1825) 2 Sim & St 448; *Johnson v Kennett* (1835) 3 My & K 624 at 630 per Lord Lyndhurst LC; *Re Rebbeck, Bennett v Rebbeck* (1894) 42 WR 473. For statutory protection see PARA 445 et seq post.

8 *Johnson v Kennett* (1835) 3 My & K 624; *Page v Adam* (1841) 4 Beav 269; *Forbes v Peacock* (1846) 1 Ph 717 at 721; *Stroughill v Anstey* (1852) 1 De GM & G 635 at 653. In *Eland v Eland* (1839) 4 My & Cr 420 the liability of the assignee to see to the payment of the legacies was not disputed.

9 *Re Henson, Chester v Henson* [1908] 2 Ch 356. See also *Parker v Judkin* [1931] 1 Ch 475, CA.

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444. Purchaser's common law protection.

A mortgagee or purchaser from a personal representative has the right to infer that the representative is acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies¹ or the application of the money². The property alienated cannot be followed into his hands by either creditor³ or legatee⁴. The alienee's title will not be affected by the fact that, in a transaction in which the representative is known to be acting as such⁵, the alienation does not purport to be made for administrative purposes⁶ or to be executed by the representative in his character as such⁷.

Where before 1926 an executor was selling freeholds under a charge of debts, the purchaser was not bound or entitled, in the absence of special circumstances, to inquire whether the debts had been paid unless 20 years had elapsed from the testator's death⁸.

At common law a purchase or mortgage for valuable consideration from an executor, who is also residuary legatee, of an asset of the testator by a person who has no notice of the existence of unsatisfied debts of the testator, is valid against the unsatisfied creditors, whether the assignee acquires a legal or an equitable interest in the asset⁹. The same principle applies to the case of a specific legacy assigned by an executor who is the specific legatee¹⁰; but where legacies are charged upon the property bequeathed to the executor, the assignee takes the property subject to the legacies charged upon it¹¹.

1 *Watkins v Cheek* (1825) 2 Sim & St 199 at 205 per Leach V-C.

2 *Corser v Cartwright* (1875) LR 7 HL 731; and see *Keane v Robarts* (1819) 4 Madd 332 at 359; *Parker v Judkin* [1931] 1 Ch 475, CA. See also PARA 445 post.

3 *Nugent v Gifford* (1738) 1 Atk 463; *Elliot v Merriman* (1740) 2 Atk 41.

4 *Ewer v Corbet* (1723) 2 P Wms 148; *Whale v Booth* (1784) 4 Term Rep 625n. See also the Administration of Estates Act 1925 ss 36(9), 38 (as amended); and PARAS 388 ante, 567 post.

5 *Solomon v Attenborough* [1912] 1 Ch 451 at 456, 459, CA; on appeal sub nom *Attenborough v Solomon* [1913] AC 76, HL.

6 See *Colyer v Finch* (1856) 5 HL Cas 905 at 923; *Corser v Cartwright* (1875) LR 7 HL 731.

7 *Re Venn and Furze's Contract* [1894] 2 Ch 101; *Re Henson, Chester v Henson* [1908] 2 Ch 356 at 364.

8 *Re Tanqueray-Willaume and Landau* (1882) 20 ChD 465, CA, shortening the period laid down in *Sabin v Heape* (1859) 27 Beav 553. The 20 years rule did not apply to a sale of leaseholds: *Re Whistler* (1887) 35 ChD 561; *Re Venn and Furze's Contract* [1894] 2 Ch 101, explaining *Re Molyneux and White* (1884) 15 LR Ir 383, CA. As to the position after 1926 see PARA 445 post.

9 *Graham v Drummond* [1896] 1 Ch 968, following the principles laid down in *Nugent v Gifford* (1738) 1 Atk 463; *Mead v Lord Orrery* (1745) 3 Atk 235; *Taylor v Hawkins* (1803) 8 Ves 209; *Whale v Booth* (1784) 4 Term Rep 625n; *Storry v Walsh* (1854) 18 Beav 559; *Scott v Tyler* (1788) 2 Dick 712; and *M'Leod v Drummond* (1807) 14 Ves 353 at 360 (on appeal (1810) 17 Ves 152).

10 *Hall v Andrews* (1872) 27 LT 195.

11 *Bank of Bombay v Suleman Somji* (1908) 99 LT 532, PC, distinguishing *Graham v Drummond* [1896] 1 Ch 968. It seems that this would not now be the case with respect to freeholds and leaseholds where the executor conveys or assigns as such. As to the over-reaching effect of a conveyance by personal representatives see PARA 440 ante.

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445. Purchaser's statutory protection: notice and receipt.

A conveyance of a legal estate¹ made by a personal representative² to a purchaser for money or money's worth is not invalidated by reason only that the purchaser may have notice that all the deceased's debts, liabilities, funeral and testamentary or administration expenses, duties and legacies have been discharged or provided for³.

No purchaser or mortgagee dealing with the representative is concerned to see that the money paid on the sale or advanced on the mortgage is wanted, or that no more than is wanted is raised, or otherwise as to its application⁴.

The written receipt of a representative for any money payable to him is a sufficient discharge to the person paying the money, and effectually exonerates him from seeing to the application or being answerable for any loss or misapplication of it⁵.

1 For the meaning of 'conveyance' see PARA 267 note 1 ante; and for the meaning of 'legal estate' see PARA 387 note 2 ante.

2 For the meaning of 'personal representative' see PARA 4 ante.

3 Administration of Estates Act 1925 s 36(8), (11). Section 36 (as amended) is applicable to assents and conveyances made on or after 1 January 1926, whether the testator or intestate died before or after that date: see s 36(12). See also *Re Spencer and Hauser's Contract* [1928] Ch 598 at 605. Apart from s 36 (as amended) doubts might have been raised as to whether the personal representative should not make title as trustee: see PARA 570 post.

4 Trustee Act 1925 ss 17, 68(1) PARA (17).

5 See *ibid* ss 14(1), 68(1) PARA (17); and TRUSTS vol 48 (2007 Reissue) PARA 1051. This provision, which re-enacts with slight variation of language the Trustee Act 1893 s 20(1) (repealed), applies notwithstanding anything to the contrary in the will: see the Trustee Act 1925 s 14(3).

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446. Purchaser's statutory protection: statements, revocation etc.

A statement in writing by a personal representative¹ that he has not given or made an assent or conveyance² in respect of a legal estate³ in land is, in favour of a purchaser for money or money's worth⁴, but without prejudice to any previous disposition⁵ made in favour of another purchaser deriving title mediately or immediately under the personal representative, sufficient evidence⁶ that an assent or conveyance has not been given or made in respect of the legal estate to which the statement relates, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or letters of administration⁷. A conveyance of a legal estate by a personal representative to a purchaser accepted on the faith of such a statement operates, without prejudice as aforesaid and unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or letters of administration, to transfer or create the legal estate expressed to be conveyed in like manner as if no previous assent or conveyance had been made by the personal representative⁸.

All conveyances of any interest in real and personal estate⁹ made to a purchaser by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation, or variation, of the probate or letters of administration¹⁰. Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation are a valid discharge to the person making the same¹¹.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 This provision applies to assents and conveyances made after 31 December 1925, whether the testator or intestate died before or after that date: Administration of Estates Act 1925 s 36(12). As to assents in relation to land generally see PARA 563 et seq post. For the meaning of 'conveyance' see PARA 267 note 1 post.

3 For the meaning of 'legal estate' see PARA 387 note 2 ante.

4 Administration of Estates Act 1925 s 36(11). As to the meaning of 'purchaser' in the Administration of Estates Act 1925 generally see PARA 267 note 4 ante.

5 For the meaning of 'disposition' see PARA 387 note 7 ante.

6 As to what is sufficient evidence cf para 567 note 5 post.

7 Administration of Estates Act 1925 s 36(6). The saving clause in this provision deprives it of most of its value as a protection. As to the placing of notice on the probate or letters of administration see PARA 567 post.

8 Ibid s 36(6). Since the conveyance must be accepted on the faith of the statement the omission to make such a statement (in practice usually made by a recital in the conveyance) cannot be remedied subsequently. A personal representative making a false statement is liable as if the statement had been contained in a statutory declaration: s 36(6). See also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 717. As to the effect of an assent see generally para 566 et seq post.

9 For the meaning of 'real estate' see PARA 3 note 1 ante.

10 See the Administration of Estates Act 1925 s 37(1); and PARA 267 ante.

11 See ibid s 27(2); and PARA 264 ante.

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447. When transaction is impeachable.

If the nature of the transaction not affecting a legal estate¹ affords intrinsic evidence that the personal representative is not acting in the execution of his duty, but is committing a breach of trust, the purchaser or mortgagee holds the property subject to the claims of creditors and beneficiaries². It rests, however, upon the person seeking to impeach the validity of the transaction to prove that the purchaser or mortgagee had notice of the true state of facts³; the mere fact that an executor who is also a devisee includes property of his own in the security⁴, or gives a security for an originally unsecured advance⁵, is not sufficient to rebut the ordinary presumption that the money has been raised for administrative purposes; but where the representative has, either expressly or informally⁶, assented to the dispositions of the will⁷, the effect of the assent is to strip the representative of his title as such and to clothe him with a title as trustee, and if after that, merely because he has physical possession of personal property, he purports to deal with it as the representative the disposition may be set aside⁸.

The title of a person who lends money to another, not known by the lender to be, but who is in fact, an executor, for his private purposes, upon an equitable mortgage of what is really the testator's property, is postponed to the prior equity of the persons beneficially interested in the property⁹. Fraud or collusion on the part of the lender will, of course, vitiate the transaction¹⁰.

1 As to transactions in the case of a legal estate see PARA 445 ante; the Administration of Estates Act 1925 s 36(7); and PARA 567 post.

2 *Watkins v Cheek* (1825) 2 Sim & St 199 at 205; *Hill v Simpson* (1802) 7 Ves 152; *Ricketts v Lewis* (1882) 20 ChD 745; *Re Verrell's Contract* [1903] 1 Ch 65; and see *Wilson v Moore* (1834) 1 My & K 337; *Walker v Taylor*

(1861) 4 LT 845, HL. The Administration of Estates Act 1925 s 36(8) applies only to legal estates in real estate, including chattels real: see PARA 445 ante.

3 *Corser v Cartwright* (1875) LR 7 HL 731. Where knowledge of facts from which the existence of a certain state of things is reasonably to be inferred is proved, actual notice exists: *Wise v Whitburn* [1924] 1 Ch 460 (notice arising out of requisition), explaining the dictum of Warrington LJ in *Re Kemnal and Still's Contract* [1923] 1 Ch 293 at 310, CA.

4 *Barrow v Griffith, Barrow v Newman* (1864) 11 Jur NS 6.

5 *Miles v Durnford* (1852) 2 De GM & G 641.

6 Since 1 January 1926 an assent to the vesting of a legal estate in real estate, including chattels real, is required to be in writing: see the Administration of Estates Act 1925 s 36(4); and PARA 564 post.

7 As to the mode and effect of assents generally see PARA 559 et seq post.

8 *Solomon v Attenborough* [1912] 1 Ch 451 at 458, CA (affd sub nom *Attenborough v Solomon* [1913] AC 76 at 82, HL); *Wise v Whitburn* [1924] 1 Ch 460.

9 *Re Morgan, Pillgrem v Pillgrem* (1881) 18 ChD 93, CA.

10 *Earl Vane v Rigden* (1870) 5 Ch App 663 at 668; *Rice v Gordon* (1848) 11 Beav 265; *Scott v Tyler* (1788) 2 Dick 712 at 725; *Ewer v Corbet* (1723) 2 P Wms 148; *Mead v Lord Orrery* (1745) 3 Atk 235 at 240; *Whale v Booth* (1784) 4 Term Rep 625n. See also the Administration of Estates Act 1925 s 55(1)(xviii) (definition of 'purchaser'); and PARA 267 note 4 ante.

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448. Sale to creditor or surviving partner.

A personal representative may sell part of the assets to a creditor at a fixed price in discharge of his debt¹, and there is no objection to the representative of a partner selling the share of the deceased partner to the surviving partners².

1 *Hepworth v Heslop* (1849) 6 Hare 561 at 569; *Earl Vane v Rigden* (1870) 5 Ch App 663 at 668; *Re Jones, Peak v Jones* [1914] 1 Ch 742 at 747.

2 *Chambers v Howell* (1847) 11 Beav 6.

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449. Representative may not sell to himself.

Personal representatives may not, without the sanction of the court¹, or authorisation by the will², sell to one of themselves either directly or indirectly³, although a sale may be made to one who has renounced the executorship⁴, and a sale cannot be impeached merely on the ground that when it was entered upon the purchaser might have proved the will, even though in fact he subsequently renounced probate⁵. Where there has been a contractual relationship between

the deceased and the personal representative the subsequent fiduciary relationship does not preclude the representative from asserting his rights under the pre-existing contract⁶, although there may be reasons for watching narrowly the course he takes in the fulfilment of the contract⁷.

1 The procedure is by CPR Pt 8 claim form under CPR Sch 1 RSC Ord 85. An order approving the purchase may be made by the master: see CPR 2.4; and *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 4.1. As to the CPR see PARA 37 note 3 ante.

2 *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA. See also *Edge v Pensions Ombudsman* [1998] Ch 512, [1998] 2 All ER 547. It is not clear whether such authorisation would be binding on creditors of an estate.

3 *Hall v Hallet* (1784) 1 Cox Eq Cas 134; *Cook v Collingridge* (1823) Jac 607; *Re Norrington, Brindley v Partridge* (1879) 13 ChD 654, CA; *Re Harvey, Harvey v Lambert* (1888) 58 LT 449. This rule does not prevent a surviving husband or wife who is also one of the personal representatives of an intestate from purchasing out of the intestate's estate an interest in the matrimonial home: see PARA 593 note 9 post. For other examples of the rule which prohibits self-dealing by personal representatives and trustees see PARA 45 ante.

4 *Mackintosh v Barber* (1822) 1 Bing 50.

5 *Clark v Clark* (1884) 9 App Cas 733, PC.

6 *Vyse v Foster* (1874) LR 7 HL 318; *Hordern v Hordern* [1910] AC 465, PC; *Re Lewis, Lewis v Lewis* (1910) 103 LT 495; *Re MacAdam, Dallow v Codd* [1946] Ch 73, [1945] 2 All ER 664; *Re Mulholland's Will Trusts, Bryan v Westminster Bank Ltd* [1949] 1 All ER 460; *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA.

7 *Vyse v Foster* (1874) LR 7 HL 318 at 332.

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450. Manner of sale.

Where a personal representative has a duty or power to sell property he has, in the absence of a direction to the contrary, power to sell, or concur with any other person in selling, all or any part of the property, either subject to prior charges or not, either together or in lots, by public auction or private contract, subject to such conditions of sale as he may think fit, with power to buy in at an auction, or to vary or rescind a contract for sale, and to resell, without being answerable for any loss¹. Before 1926 it had ultimately been decided that the power to sell all or any part of the property would justify a sale of minerals² apart from the land, without the sanction of the court³. Since 1 January 1926 power to sell or dispose of land includes power to sell or dispose of part of it, whether the division is horizontal, vertical or made in any other way⁴. The representative has in any case in relation to land the powers of an absolute owner⁵.

1 Trustee Act 1925 ss 12(1), 69(1), (2) (s 12(1) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(2)). The Trustee Act 1925 s 12(1) (as amended) and those relating to trustees set out in the text and note 4 infra, and in PARAS 451-452 post, are applied to personal representatives by the Trustee Act 1925 s 68(1) PARA (17) (see PARA 5 ante). See also the Administration of Estates Act 1925 s 39(1) (as amended) (see PARA 438 ante); and TRUSTS vol 48 (2007 Reissue) PARA 603.

2 In the case of timber (a very doubtful analogy: see *Re Chaplin and Staffordshire Potteries Waterworks Co's Contract* [1922] 2 Ch 824 at 847, CA), it was held in *Cholmeley v Paxton* (1825) 3 Bing 207 (affd sub nom *Cockerell v Cholmeley* (1830) 10 B & C 564), that trustees could not sell land without the timber, or the timber without the land.

3 *Re Chaplin and Staffordshire Potteries Waterworks Co's Contract* [1922] 2 Ch 824, CA, where the earlier conflicting authorities were considered and explained.

4 Trustee Act 1925 s 12(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 3(2)). See TRUSTS vol 48 (2007 Reissue) PARA 1042.

5 See the Trusts of Land and Appointment of Trustees Act 1996 ss 6(1), 18; and PARA 438 ante.

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451. Depreciatory conditions.

A sale by a personal representative cannot be impeached by a beneficiary upon the ground that any of the conditions of sale were unnecessarily depreciatory, unless it also appears that the consideration for the sale was rendered inadequate as a result¹. After execution of the conveyance, in order to impeach the sale for unnecessarily depreciatory conditions, it must be shown that the purchaser was acting in collusion with the representative at the time when the contract for sale was made².

The representative has a statutory power of giving a valid discharge for money, securities or other personal property or effects payable, transferable or deliverable to him under any trust or power³.

1 Trustee Act 1925 s 13(1).

2 Ibid s 13(2). Section 13 applies to sales made before or after 1 January 1926: s 13(4).

3 Ibid s 14(1). See also PARA 438 ante. The restriction by virtue of which a sole trustee (other than a trust corporation) cannot give a valid receipt for the proceeds of sale of land or other capital money arising under a trust of land (see s 14(2) (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 1051) does not apply to a sole personal representative: see the Law of Property Act 1925 s 27(2) (substituted by the Law of Property (Amendment) Act 1926 s 7, Schedule; and amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4); and the Administration of Estates Act 1925 s 2(1) (see PARA 363 ante).

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452. Power to insure.

The statutory authority¹ to insure personal property conferred on the personal representative cannot be exercised where he is bound, upon request, forthwith to convey the property absolutely to a beneficiary². The representative is not personally liable for omitting to insure³.

1 Ie under the Trustee Act 1925 s 19(1) (as amended): see TRUSTS vol 48 (2007 Reissue) PARA 1047. A personal representative has in relation to land all the powers of an absolute owner: see the Trusts of Land and Appointment of Trustees Act 1996 ss 6(1), 18; and PARA 438 ante.

2 See the Trustee Act 1925 s 19(2) (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 1047.

3 *Fry v Fry* (1859) 27 Beav 144 at 146.

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453. Power of distress.

A personal representative¹ may distrain for arrears of a rentcharge² due or accruing to the deceased in his lifetime on the land³ affected or charged with it, so long as the land remains in the possession⁴ of the person liable to pay the rentcharge or of the persons deriving title under him, and in like manner as the deceased might have done had he been living⁵. A personal representative may distrain upon land for arrears of rent due or accruing to the deceased in like manner as the deceased might have done had he been living⁶. Such arrears may be distrained for after the termination of the lease or tenancy as if the term or interest had not determined, if the distress is made⁷: (1) within six months after the termination of the lease or tenancy⁸; or (2) during the continuance of the possession of the lessee or tenant from whom the arrears were due⁹. The statutory enactments relating to distress for rent apply to any distress made pursuant to this provision¹⁰.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 For the meaning of 'rentcharge' see PARA 346 note 1 ante. As to rentcharges generally see RENTCHARGES AND ANNUITIES.

3 For the meaning of 'land' see PARA 364 note 1 ante.

4 For the meaning of 'possession' see PARA 441 note 8 ante.

5 Administration of Estates Act 1925 s 26(3), replacing as respects deaths after 1925 the Cestui que Vie Act 1540 s 1 (repealed as respects deaths after 1925).

6 Administration of Estates Act 1925 s 26(4).

7 Ibid s 26(4).

8 Ibid s 26(4)(a).

9 Ibid s 26(4)(b).

10 Ibid s 26(4).

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(iii) Power to carry on the Deceased's Business

454. Necessity for express power to carry on business.

An executor had formerly no power, in the absence of a direction contained in his testator's will, to carry on the testator's business¹, whether carried on in partnership or by the testator alone, except for the purpose of winding it up². A general power to postpone the conversion of a testator's estate bequeathed upon trust for sale is sufficient authority to an executor to carry on the business for a reasonable period with a view to selling it as a going concern³, and may be sufficient to authorise the business to be carried on during any period of postponement until the date for actual distribution arrives, if the power to postpone is properly exercised⁴. Since 1925 a power to postpone sale is implied in every trust for sale of land⁵.

Although, however, the executor may have no authority to continue the business, it is his duty, as it is also that of an administrator, to do whatever may be required to be done to preserve the business as an asset⁶, and if he acts in good faith and to the best of his judgment he is not liable for a breach of trust in continuing it for some years⁷.

A power to an executor to carry on his testator's business may not upon his renouncing empower an administrator with the will annexed to do so⁸; nor will the court normally authorise an administrator to carry on an intestate's trade where the parties interested are not sui juris⁹.

1 *Kirkman v Booth* (1848) 11 Beav 273.

2 *Collinson v Lister* (1855) 20 Beav 356; affd 7 De GM & G 634. As to the personal representative's right to have a partnership business wound up see PARA 338 ante.

3 *Re Chancellor, Chancellor v Brown* (1884) 26 ChD 42, CA; *Re Smith, Arnold v Smith* [1896] 1 Ch 171. As to the power to carry on the business of the holder of a licence to sell intoxicating liquor see the Licensing Act 1964 s 10(5) (as substituted and amended); and LICENSING AND GAMBLING.

4 *Re Crowther, Midgley v Crowther* [1895] 2 Ch 56. See also *Re Smith, Arnold v Smith* [1896] 1 Ch 171 at 174 per North J; *Re Ball, Jones v Jones* (1930) 74 Sol Jo 298; as considered in *Re Rooke, Rooke v Rooke* [1953] Ch 716 at 723, sub nom *Re Rooke's Will Trusts, Taylor v Rooke* [1953] 2 All ER 110 at 113-114.

5 See the Law of Property Act 1925 s 25(1) (repealed from 1 January 1997), which had effect subject to a contrary intention, and with effect from 1 January 1997, the Trusts of Land and Appointment of Trustees Act 1996 s 4(1), which has effect despite any provision to the contrary made by the disposition on trust for sale of land.

6 *Strickland v Symons* (1883) 22 ChD 666 at 671 per Pollock B; on appeal (1884) 26 ChD 245, CA. See also *Marshall v Broadhurst* (1831) 1 Cr & J 403. As to the personal representative's duty to act gratuitously see PARA 38 ante. It has been held in Canada that a depreciation allowance may be charged against income payable to the tenant for life: *Re Stekl* (1973) 40 DLR (3d) 407, BC SC. In making decisions as to the conduct of the business the court's guidance may be obtained under CPR Sch 1 RSC Ord 85 r 2(2)(a): see PARA 713 et seq post. As to the CPR see PARA 37 note 3 ante.

7 *Garrett v Noble* (1834) 6 Sim 504.

8 In *Lambert v Rendle* (1863) 3 New Rep 247, the will appointed separate persons as executors and trustees and conferred power to carry on the business on the executors only, and was held not to authorise the administrators to do so. See also PARA 471 post.

9 *Land v Land* (1874) 43 LJ Ch 311.

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455. What funds may be employed.

An executor who is authorised to carry on the testator's business is not entitled to employ in the business any of the general assets of his testator beyond the fund directed to be so employed¹. Where the testator has not authorised the employment of any of his general assets the executor is only entitled to employ the assets already embarked in the business².

1 *Re Ballman, ex p Garland* (1804) 10 Ves 110; *Cutbush v Cutbush* (1839) 1 Beav 184.

2 *Re Hodson, ex p Richardson* (1818) 3 Madd 138; affd (1819) Buck 421.

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456. Borrowing powers.

If the executor finds it impossible to carry on the testator's business with the assets already engaged in it or authorised by his testator, he should apply to the court for its directions¹. He has no power to borrow money for the purpose and charge his testator's assets outside the business with repayment of the loan², although he can give a valid charge upon the assets already engaged in the business³. Where the representative has express authority to increase the business, he is entitled to borrow money and secure the loan by mortgage of assets outside the business⁴.

1 *M'Neillie v Acton* (1853) 4 De GM & G 744. As to the procedure see PARA 713 et seq post.

2 *M'Neillie v Acton* (1853) 4 De GM & G 744.

3 *Devitt v Kearney* (1883) 13 LR Ir 45, CA.

4 See *Re Dimmock, Dimmock v Dimmock* (1885) 52 LT 494.

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457. Conversion into limited company.

It has been held in Scotland that a power given to an executor to carry on the testator's business authorises the conversion of the business into a private limited company with the same capital and under the same control as before¹.

It is submitted that this case would not be followed in England. An authority to executors to carry on a business supposes that the exclusive control of the business will remain in the executors for the time being until the business is disposed of, whereas by changes in the board, alteration of the articles, increase of capital and so forth the whole structure and control of a company may be changed. The necessary power is frequently given by express clauses in wills, and where these are lacking the court will supply the omission in appropriate cases.

- 1 *Mackechnie's Trustees v Macadam* 1912 SC 1059.

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458. Representative's liability and right to indemnity.

The personal representative is personally liable upon all contracts into which he enters and for all debts which he incurs in carrying on the deceased's business¹, notwithstanding that he avowedly contracts as representative²; but he is entitled to be indemnified out of the assets in respect of all liabilities properly incurred in carrying on a business, even in priority to the claims of the deceased's creditors, where he has carried it on for such reasonable time as is necessary to enable him to sell it as a going concern³. It rests upon the representative to prove that he has acted with a view to selling the business as a going concern⁴.

1 *Re Ballman, ex p Garland* (1804) 10 Ves 110; *Re Hodson, ex p Richardson* (1818) 3 Madd 138; *Owen v Delamere* (1872) LR 15 Eq 134; *Re Percy, Fairland v Percy* (1875) LR 3 P & D 217; *Re Morgan, Pillgrem v Pillgrem* (1881) 18 ChD 93 at 99, CA; *Re Evans, Evans v Evans* (1887) 34 ChD 597, CA. The executor may be made bankrupt (*Re Ballman, ex p Garland* supra), but executors carrying on their testator's business cannot be adjudicated bankrupt on the footing that they are partners. They may be joint debtors and liable to be made bankrupt individually: *Re Fisher & Sons* [1912] 2 KB 491. As to the duty of a personal representative to act gratuitously see PARA 38 ante.

2 *Labouchere v Tupper* (1857) 11 Moo PCC 198; *Liverpool Borough Bank v Walker* (1859) 4 De G & J 24.

3 *Dowse v Gorton* [1891] AC 190 at 199, HL, per Lord Herschell.

4 *Re Millard, ex p Yates* (1895) 72 LT 823, CA.

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459. Extent of indemnity.

A direction contained in the will for the continuance of the testator's business is binding upon the beneficiaries, so that, as against them, the executor is entitled to resort to the assets authorised to be employed in the business to indemnify himself against liabilities incurred in carrying it on¹. The direction is not, however, binding upon the testator's creditors, and the executor cannot by reason only of such authority maintain a claim to indemnity as against them².

Where, however, those creditors have agreed to the continuance of the business, the personal representative is entitled to be indemnified out of the estate in priority to their claims³, and the indemnity is not to be limited to that portion of the assets which has come into existence, or changed its form since the death⁴. The creditors' agreement must be a consent to the carrying on of the business for them or for the estate of which they are creditors and against which they have a right to claim. Whether such consent has been given or not is a question of fact, but

consent is not to be implied merely from the creditors' conduct in not interfering with the business⁵. In the case of consent by a testator's creditors the right to an indemnity exists independently of any authority by the testator to continue the business⁶. A receiver or manager appointed in an administration action in succession to an executor is entitled to be indemnified on the same principles as the executor⁷.

1 *Re Ballman, ex p Garland* (1804) 10 Ves 110; *Re Beater, ex p Edmonds* (1862) 4 De GF & J 488 at 498.

2 *Dowse v Gorton* [1891] AC 190 at 199, HL, per Lord Herschell; *Re Millard, ex p Yates* (1895) 72 LT 823, CA; *Lucas v Williams (No 2)* (1862) 4 De GF & J 439; *Re East, London County and Westminster Banking Co Ltd v East* (1914) 111 LT 101, CA.

3 Questions of this nature will generally arise when the estate is insolvent, and then, as there is nothing for the beneficiaries, the creditors are really masters of the situation. As to insolvent estates see PARA 399 et seq ante.

4 *Dowse v Gorton* [1891] AC 190, HL.

5 *Re Oxley, John Hornby & Sons v Oxley* [1914] 1 Ch 604, CA, disapproving on this point dicta in *Re Brooke, Brooke v Brooke* [1894] 2 Ch 600 at 607; *Re Hodges, Hodges v Hodges* [1899] 1 IR 480 at 484.

6 *Re Brooke, Brooke v Brooke* [1894] 2 Ch 600.

7 *Re Brooke, Brooke v Brooke* [1894] 2 Ch 600; *O'Neill v McGrorty* [1915] 1 IR 1.

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460. Representative's creditors' right of subrogation.

The remedy of a creditor for a debt contracted after the death is against the personal representative and not against the estate¹; but the creditor is in equity entitled to stand in the place of the personal representative and to claim the benefit of his right to an indemnity². Accordingly, where the business has been continued by the representative with the consent of the deceased's creditors, the representative's creditors are entitled to payment in priority to the deceased's creditors³.

This right is, however, strictly confined to the assets to which the representative himself could have resorted for an indemnity⁴. Accordingly, where the representative has lost his right to an indemnity because he is in default to the estate, the creditors are in no better position, and are not entitled to have their debts paid out of the specific assets unless the default is made good⁵. Where there are several representatives, one of whom is in default to the trust estate, but the others can show clear accounts, the creditors can claim the benefit of the indemnity to which the representatives with the clear accounts are entitled⁶. A mere default in rendering accounts is not sufficient to destroy the indemnity; there must be an indebtedness to the estate on the part of the representatives⁷.

1 *Farhall v Farhall* (1871) 7 Ch App 123; *Owen v Delamere* (1872) LR 15 Eq 134.

2 *Re Beater, ex p Edmonds* (1862) 4 De GF & J 488 at 498; *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548; *Re Evans, Evans v Evans* (1887) 34 ChD 597, CA; *Moore v M'Glynn* [1904] 1 IR 334. As to the right of subrogation see EQUITY vol 16(2) (Reissue) PARA 770 et seq.

3 *Re Hodges, Hodges v Hodges* [1899] 1 IR 480. The same rule applies where the executor has continued the business under an administration order (*Tinkler v Hindmarsh* (1840) 2 Beav 348), but not where a legatee has carried on the business with the acquiescence of the executors (*Re O'Kelly, Burke v Whelan* [1920] 1 IR 200).

4 *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548; *Re Morris* (1889) 23 LR Ir 333.

5 *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548.

6 *Re Frith, Newton v Rolfe* [1902] 1 Ch 342.

7 *Re Kidd, Kidd v Kidd* (1894) 70 LT 648.

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461. Right to administration order.

The right of a trade creditor to the benefit of the personal representative's indemnity entitles him to an order for the administration of the deceased's estate¹. As between the representative and his trade creditors, the representative's right to an indemnity out of the assets for his costs and expenses prevails over the creditor's right to be paid out of those assets². Where an administration order has been made the representative's trade creditors are entitled to interest on their debts from the date when the master has certified the debts³. A representative who has advanced his own money to pay debts incurred in carrying on the business is entitled to interest on the balance due to him at the end of each year⁴.

1 *Re Shorey, Smith v Shorey* (1898) 79 LT 349.

2 *Re Owen, Frisby, Dyke & Co v Owen* (1892) 66 LT 718.

3 *Re Brace, Hull v Johns* [1936] Ch 690, [1936] 2 All ER 767.

4 See *Finch v Pescott* (1874) LR 17 Eq 554; and PARA 805 post.

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(iv) Power to Compromise

462. Compromise of claims generally.

A personal representative has extensive powers to compromise claims¹ in external disputes². It is a wide power under which the terms of the compromise may include, where the other party to the compromise is a beneficiary, the other party giving up his or her beneficial interest³. In cases of difficulty the personal representative may apply to the court, surrender his discretion, and ask the court to exercise it⁴. The only question to be considered in the case of a compromise effected by a personal representative under these powers is whether the

representative has acted in good faith or not. Any one of several representatives may settle an account, and the settlement is binding upon the others⁵.

A personal representative has no power, without the consent of, or approval of the court on behalf of⁶, all parties interested in the estate, to compromise a question involving the validity of the will, and consequently his own position as executor⁷, or a family provision claim⁸, or any internal dispute⁹ such as the interpretation of the will.

1 *Re Houghton, Hawley v Blake*[1904] 1 Ch 622 at 625 per Kekewich J. For the statutory power see the Trustee Act 1925 s 15; and TRUSTS vol 48 (2007 Reissue) PARA 1052.

2 In cases in which there is some issue between the trustees or personal representatives on behalf of the trust or estate as a whole, and the outside world: see *Re Earl of Strafford, Royal Bank of Scotland Ltd v Byng*[1980] Ch 28 at 32, [1978] 3 All ER 18 at 20 per Sir Robert Megarry V-C; affd [1980] Ch 28, [1979] 1 All ER 513, CA.

3 *Re Earl of Strafford, Royal Bank of Scotland Ltd v Byng*[1980] Ch 28, [1979] 1 All ER 513, CA.

4 See *Re Ezekiel's Settlement Trusts, National Provincial Bank Ltd v Hyam*[1942] Ch 230, CA (where the court approved a compromise despite the opposition of the adult beneficiaries); *Re Earl of Strafford, Royal Bank of Scotland Ltd v Byng*[1980] Ch 28, [1979] 1 All ER 513, CA. As to the procedure see PARA 713 et seq post.

5 *Smith v Everett* (1859) 27 Beav 446 at 454; *Fountain Forestry Ltd v Edwards*[1975] Ch 1, [1974] 2 All ER 280.

6 As to the court's powers to approve compromises on behalf of children and patients see CPR 21.10; and *Practice Direction--Children and Patients* (1999) PD 21 para 6; and for the court's powers, in proceedings concerning estates of deceased persons, to approve compromises on behalf of persons who are not parties to the proceedings, including unborn or unascertained persons see CPR Sch 1 RSC Ord 15 r 13(4); CPR Sch 2 CCR Ord 5 r 6(3). See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

7 *Graham v M'Cashin*[1901] 1 IR 404 at 413, CA. As to compromise in contentious probate proceedings see PARA 294 ante.

8 Such a claim is in the nature of a claim to a beneficial interest in the estate. As to family provision claims see PARA 665 et seq post. The power of the court to approve a compromise on behalf of non-parties (see note 6 supra) applies to family provision proceedings: CPR Sch 1 RSC Ord 99 r 4(2).

9 In where one beneficiary under the trusts is at issue with another beneficiary under the trusts: see *Re Earl of Strafford, Royal Bank of Scotland Ltd v Byng*[1980] Ch 28 at 32-33, [1978] 3 All ER 18 at 20 per Sir Robert Megarry V-C; affd [1980] Ch 28, [1979] 1 All ER 513, CA. However, in *Re Warren, Weedon v Reading* (1884) 53 LJ Ch 1016 (a decision upon a provision in 23 & 24 Vict c 145 (Powers of Trustees, Mortgagees, etc) (1860) s 30 (repealed), which was similar in wording to the Trustee Act 1925 s 15(f)) it was stated that the power extended to a compromise where the estate had been distributed to certain relatives of the testator, there was then a claim by persons not previously known to the executors, and the executors compromised the claims of the latter by paying agreed sums out of the executors' own pockets.

UPDATE

462 Compromise of claims generally

NOTE 6--CPR 21.10 amended: SI 2004/3419, SI 2010621. *Practice Direction--Children and Patients* (1999) PD 21 para 6 amended. CPR Sch 1 RSC Ord 15 r 13, Sch 2 CCR Ord 5 r 6 revoked: SI 2000/221.

TEXT AND NOTE 8--CPR Sch 1 RSC Ord 99 r 4(2) revoked: SI 2002/2058.

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463. Compromise of co-executor's claim.

It has been held that one of two executors may, in a proper case, compromise a claim of his co-executor against the estate¹. The position is, however, a delicate one, and the executor would do well to apply to the court for its directions². Where the compromise is shown to be injurious to the estate it will not be upheld³; nor can a settlement of accounts between a body of trustees and one of their number bar the right of the beneficiaries to investigate and challenge the accounts⁴.

1 *Re Houghton, Hawley v Blake* [1904] 1 Ch 622.

2 *Re Houghton, Hawley v Blake* [1904] 1 Ch 622 at 626. As to such applications see PARA 713 et seq post.

3 *De Cordova v De Cordova* (1879) 4 App Cas 692, PC.

4 *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA.

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(v) Power to pay into Court

464. Statutory right to pay into court.

Personal representatives have a statutory right to pay money or securities belonging to their trust into court¹ and they may indeed be forced to do so by the court on application by a person interested². The receipt or certificate of the proper officer is a sufficient discharge³. Where the majority are desirous of making the payment in, the court may order the payment in to be made without the concurrence of the minority⁴; and when the money or securities are deposited with any bank, broker or other depository, may order payment or delivery to the majority for the purpose of payment into court⁵.

A judgment creditor of a creditor of the deceased cannot obtain a garnishee order against funds paid into court by the deceased's representatives⁶.

1 Trustee Act 1925 ss 63(1), 68(1) PARA (17) (amended by the Administration of Justice Act 1965 s 36(4), Sch 3). See also TRUSTS vol 48 (2007 Reissue) PARA 917.

2 The application is by claim form under CPR Pt 8: see *Practice Direction--Part 8* (1999) PD 8B para A.1(3). The claim would have been brought by originating summons before the CPR came into force on 26 April 1999. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

3 See the Trustee Act 1925 s 63(2); and TRUSTS vol 48 (2007 Reissue) PARA 917. See also *Re Salaman, De Pass v Sonnenthal* [1907] 2 Ch 46; revsd on another point [1908] 1 Ch 4, CA.

4 See the Trustee Act 1925 s 63(3); and TRUSTS vol 48 (2007 Reissue) PARA 917.

5 See *ibid* s 63(4); and TRUSTS vol 48 (2007 Reissue) PARA 917. As to county court jurisdiction see PARA 465 text to note 9 post.

6 *Stevens v Phelps*(1875) 10 Ch App 417. As to garnishee orders generally see EXECUTION.

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465. Practice in paying in.

Where the money or securities represent a legacy, or residue or any share of it, to which a child or a person resident outside the United Kingdom¹ is absolutely entitled, no witness statement or affidavit need be filed and the money or securities may be paid into court in the prescribed manner². The personal representative must prepare a written request, signed by or on behalf of the representative³, upon receipt of which the Accountant General will issue the necessary approval for lodgment⁴.

In all other cases the representative must make and file a witness statement or affidavit⁵, and on receipt of a lodgment schedule and a copy of the witness statement or affidavit the Accountant General will give approval for lodgment⁶. Once the lodgment has been made the representative must send notice of it to every person appearing from the witness statement or affidavit to be entitled to, or to have an interest in, the money or securities lodged⁷.

Where the money or securities to be paid into court do not exceed the county court limit⁸ they may be paid into a county court⁹.

1 'United Kingdom' means Great Britain and Northern Ireland: Trustee Act 1925 s 68(1) PARA (20).

2 CPR Sch 1 RSC Ord 92 r 2(2). The payment into court must be made in the manner prescribed by the Supreme Court Funds Rules for the time being in force: see CPR Sch 1 RSC Ord 92 r 2(2). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

3 See the Court Funds Rules 1987, SI 1987/821, r 15(1)(ii)(b); and COURTS.

4 See *ibid* r 15(1); and COURTS. As to the Accountant General see COURTS.

5 See CPR Sch 1 RSC Ord 92 r 2(1), which details the contents of the witness statement or affidavit; and TRUSTS vol 48 (2007 Reissue) PARA 920.

6 See the Court Funds Rules 1987, SI 1987/821, r 14(1); and COURTS. The procedure is therefore the same as for any lodgment under the Trustee Act 1925 s 63 (see TRUSTS vol 48 (2007 Reissue) PARA 917) except one to which CPR Sch 1 RSC Ord 92 r 2(2) applies.

7 CPR Sch 1 RSC Ord 92 r 4.

8 As to the county court limit see PARA 275 note 3 ante.

9 See the Trustee Act 1925 s 63A(3)(d) (s 63A added by the County Courts Act 1984 s 148(1), Sch 2 Pt I para 1). As to the manner of paying funds into a county court see CPR Sch 2 CCR Ord 49 r 20; and COURTS.

UPDATE

465 Practice in paying in

TEXT AND NOTES--CPR Sch 1 RSC Ord 92, Sch 2 CCR Ord 49 r 20 revoked: SI 2002/2058. SI 1987/821 r 14 amended: SI 2003/375, SI 2007/729, SI 2007/2617. SI 1987/821 r 15 amended: SI 2003/375, SI 2007/729.

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466. When lodgment is justifiable.

Personal representatives are justified in paying a fund into court where there is a reasonable doubt as to the person entitled to it¹, and the only question arising cannot readily be settled by means of an application to the court². They are also justified in doing so where there is difficulty in obtaining their discharge³ by reason of the minority⁴ or physical⁵ or mental⁶ incapacity of the person entitled, or because he is abroad and they are uncertain, for example, whether he is alive or dead⁷. They ought not to do so for the mere purpose of escaping liability when there is no reasonable doubt as to the performance of their trust⁸, nor merely to avoid threatened proceedings⁹, or to escape their responsibilities in contesting unfounded claims¹⁰ or in discovering whether or not a power has been exercised¹¹. The beneficiaries' refusal to execute a release is not of itself a sufficient reason for representatives to pay money into court¹².

A representative who pays a fund into court loses any discretionary powers he may have with regard to the application of the fund¹³, but he remains a trustee¹⁴.

1 *Re Wyll's Trust* (1860) 28 Beav 458; *Re Jones* (1857) 3 Drew 679; *Re Davies' Trusts* (1914) 59 Sol Jo 234.

2 *Re Giles* (1886) 55 LJ Ch 695. The power to advertise and other protection given by the Trustee Act 1925 ss 26-30 (ss 26, 27 as amended) (see TRUSTS vol 48 (2007 Reissue) PARAS 914-915) have since 1925 resulted in less use being made of the power to pay into court. Abuse of the power may result in the personal representative being deprived of his costs: *Re Giles* supra at 696 per Kay J.

3 *Re Parker's Will* (1888) as reported in 58 LJ Ch 23 at 25, CA, per Fry LJ. As to the discharge of personal representatives see PARA 480 post.

4 *Re Hodges* (1855) 4 De GM & G 491; *Re Richards* (1869) LR 8 Eq 119. However, a parent or guardian with parental responsibility for a minor now has a right to receive in his own name, for the benefit of the minor, property which the minor is entitled to receive: see the Children Act 1989 s 3(3); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 40, 135.

5 *Re Biddulph's Trusts*, *Re Poole's Trusts* (1852) 5 De G & Sm 469.

6 *Re Parker's Will* (1888) 39 ChD 303, CA.

7 *Re Elliot's Trusts* (1873) LR 15 Eq 194 at 197.

8 *Re Elliot's Trusts* (1873) LR 15 Eq 194.

9 *Re Fagg's Trust* (1850) 19 LJ Ch 175.

10 *Re Thakeham Sequestration Moneys* (1871) LR 12 Eq 494.

11 *Re Cull's Trusts* (1875) LR 20 Eq 561.

12 *Re Cater's Trusts (No 2)* (1858) 25 Beav 366; *Re Roberts' Trusts* (1869) 38 LJ Ch 708.

13 *Re Murphy's Trusts* [1900] 1 IR 145, following *Re Williams' Settlement* (1858) 4 K & J 87; *Re Coe's Trust* (1858) 4 K & J 199, and dissenting from *Re Landon's Trusts* (1871) 40 LJ Ch 370.

14 *Thompson v Tomkins* (1862) 2 Drew & Sm 8; *Barker v Peile* (1865) 2 Drew & Sm 340; cf *Re Poplar and Blackwall Free School* (1878) 8 ChD 543; *Re Bailey's Trust* (1954) 3 WR 31.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(5) TRUSTS AND POWERS OF THE REPRESENTATIVE/(v) Power to pay into Court/467. Costs.

467. Costs.

Where the lodgment is made upon a request unaccompanied by an affidavit, the personal representative is not entitled to deduct from the amount paid in the cost of paying it in¹. In other cases he may deduct the reasonable costs of the payment into court where no dispute has arisen, or is likely to arise, as to the deduction², but the better course is for him to pay in the whole fund, leaving it for the court to settle the amount of costs to which he is entitled upon the application for payment out³. The court's jurisdiction on applications relating to the fund is limited to the fund actually paid into court, and does not extend to sums which have been deducted before payment in; if the beneficiaries desire to question the deductions, they must bring a separate action⁴.

1 See the note on Court Funds Office Form 104.

2 *Beaty v Curson* (1868) LR 7 Eq 194. In the case of payment into a county court, the costs are assessed by the detailed procedure and the amount assessed may be retained by the person paying in: see CPR Sch 2 CCR Ord 49 r 20(3); and COURTS. As to the CPR see PARA 37 note 3 ante.

3 *Re Parker's Will* (1888) 39 ChD 303, CA.

4 *Re Bloye's Trust* (1849) 1 Mac & G 488 at 504; *Re Barber's Will* (1849) 32 LJ Ch 709; *Re Parker's Will* (1888) 39 ChD 303, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(5) TRUSTS AND POWERS OF THE REPRESENTATIVE/(vi) Power to employ Agents/468. Power to employ and pay agents.

(vi) Power to employ Agents

468. Power to employ and pay agents.

Instead of acting personally, personal representatives may employ and pay an agent, whether a solicitor, banker, stockbroker or other person, to transact any business or do any act required to be transacted or done in the administration of the testator's or intestate's estate, including the receipt and payment of money¹. They are entitled to be allowed and paid all charges and expenses incurred and are not responsible for the default of any such agent properly employed in good faith².

Personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immovable, forming part of the testator's or intestate's estate in any place outside the

United Kingdom³, or in executing or exercising any discretion or trust or power vested in them in relation to any such property⁴. They may give such ancillary powers and may add such provisions and restrictions as they may think fit, including a power to appoint substitutes⁵. They are not, by reason only of their having made such appointment, responsible for any loss arising as a result⁶.

Representatives have also the same powers as trustees with reference to the appointment of solicitors to receive and give discharges for money or valuable consideration or property and of bankers or solicitors to receive and give discharges for money payable under insurance policies⁷.

1 Trustee Act 1925 s 23(1). A direction contained in a testator's will that his executors should employ a particular person as solicitor is not binding upon the executors, and does not confer any right on the person named to be employed as solicitor: *Finden v Stephens* (1846) 2 Ph 142; *Shaw v Lawless* (1838) 5 Cl & Fin 129, HL; *Foster v Elsley* (1881) 19 ChD 518. As to the appointment and functions of co-adjudors or overseers of a will see Went Off Ex (14th Edn) 2.

2 Trustee Act 1925 s 23(1). See also TRUSTS vol 48 (2007 Reissue) PARA 998.

3 For the meaning of 'United Kingdom' see PARA 465 note 1 ante.

4 Trustee Act 1925 s 23(2).

5 Ibid s 23(2).

6 Ibid s 23(2).

7 See ibid ss 23(3), 68(1) PARA (17), 69(1); and TRUSTS vol 48 (2007 Reissue) PARA 998.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(5) TRUSTS AND POWERS OF THE REPRESENTATIVE/(vi) Power to employ Agents/469. Representative's liability.

469. Representative's liability.

A personal representative who employs an agent does not by doing so divest himself of his duties as a personal representative¹. He is personally liable in contract to the agent², but is entitled to be indemnified out of the estate to the extent that the contract is a proper one in the circumstances³. He may accordingly make payments in respect of the contract of agency directly from the trust estate⁴.

1 *Re Weall, Andrews v Weall* (1889) 42 ChD 674. See also TRUSTS vol 48 (2007 Reissue) PARA 1004. As to agency generally see AGENCY.

2 *Stanier v Evans* (1886) 34 ChD 470 at 476; *Re Blundell, Blundell v Blundell* (1888) 43 ChD 370 at 376.

3 *Stanier v Evans* (1886) 34 ChD 470. As to the representative's duty himself to act gratuitously see PARA 38 ante.

4 *Re Blundell, Blundell v Blundell* (1888) 40 ChD 370 at 377.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(5) TRUSTS AND POWERS OF THE REPRESENTATIVE/(vii) Survivorship of Powers/470. Statutory survivorship.

(vii) Survivorship of Powers

470. Statutory survivorship.

There is statutory provision, in the absence of a contrary direction in the will¹, for the survivor or survivors to exercise powers or trusts given to or imposed on two or more personal representatives jointly².

1 See the Trustee Act 1925 s 69(2), by which the powers conferred by that Act, unless otherwise stated, apply only so far as a contrary intention is not expressed in the trust instrument. See TRUSTS vol 48 (2007 Reissue) PARA 603.

2 See *ibid* ss 18(1), 68(1) PARA (17), 69(1); and TRUSTS vol 48 (2007 Reissue) PARA 983. As to the exercise of powers and trusts by the personal representative of a sole or last surviving or continuing trustee see PARA 370 *ante*.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/5. THE ADMINISTRATION OF ASSETS/(5) TRUSTS AND POWERS OF THE REPRESENTATIVE/(vii) Survivorship of Powers/471. Whether powers are personal or annexed to office.

471. Whether powers are personal or annexed to office.

The question whether a power is intended to be personal to the individuals to whom it is given, or whether it is intended to be annexed to their office, is one of construction¹.

The presumption is that every power given to trustees which enables them to deal with or affect the trust property is *prima facie* given to them *ex officio* as an incident of their office and passes with the office to the holders or holder for the time being². The mere fact that the power is one requiring the exercise of a wide personal discretion is not enough to exclude the *prima facie* presumption. The testator's reliance on the individuals to the exclusion of the holders of the office must be expressed in clear and apt language³. The fact that the power is expressed to be given to 'my executors herein named'⁴ or 'to my trustees in whom I place complete confidence'⁵ is not sufficient to indicate that there is a confidence reposed in the individuals apart from their official capacity. Where the power is annexed to the office, an executor who renounces probate is incapable of exercising it⁶.

1 See also POWERS vol 36(2) (Reissue) PARAS 219 *et seq*, 261-262.

2 *Re Smith, Eastick v Smith* [1904] 1 Ch 139; *Re De Sommery, Coelenbier v De Sommery* [1912] 2 Ch 622.

3 *Re Smith, Eastick v Smith* [1904] 1 Ch 139 at 144 per Farwell J, commenting upon the dictum of Sir W Grant MR in *Cole v Wade* (1807) 16 Ves 27 at 44, 'that wherever the power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given; and will not, except by express words, pass to others, to whom by legal transmission the same character may happen to belong'.

4 *Re Mainwaring, Crawford v Forshaw* [1891] 2 Ch 261, CA. See also *Re Bacon, Toovey v Turner* [1907] 1 Ch 475.

5 *Re Symm's Will Trusts, Public Trustee v Shaw* [1936] 3 All ER 236.

6 *Re Mainwaring, Crawford v Forshaw* [1891] 2 Ch 261, CA. See also *Keates v Burton* (1808) 14 Ves 434; *A-G v Fletcher* (1835) 5 LJ Ch 75. A power to an executor to carry on the testator's business may not, upon the executor renouncing, be exercisable by an administrator: see PARA 454 text and note 8 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(i) Classification of Legacies/472. Specific legacies.

6. THE DISTRIBUTION OF ASSETS

(1) LEGACIES AND ANNUITIES

(i) Classification of Legacies

472. Specific legacies.

Legacies¹ are ordinarily divided into two classes, specific legacies and general legacies, general legacies also being described as legacies of quantity or number².

A specific legacy must be of some thing or of some interest, legal or equitable³, forming part of the testator's estate; it must be a part as distinguished from the whole of his personal property or from the whole of the general residue of his personal estate; it must be identified by a sufficient description, and separated in favour of the particular legatee from the general mass of the testator's personal estate⁴. The forgiveness of a debt by will is a specific legacy of the debt⁵.

1 As to the danger of distributing legacies within six months of probate where a claim under the Inheritance (Provision for Families and Dependants) Act 1975 is likely see PARA 477 post.

2 Swinburne on Wills (7th Edn) 308n. As to the failure of legacies see WILLS vol 50 (2005 Reissue) PARA 471 et seq. As to ademption and satisfaction see EQUITY vol 16(2) (Reissue) PARA 739 et seq. As to a third class of legacy see PARA 474 post.

3 *Re Sherman, Re Walters, Trevenen v Pearce*[1954] Ch 653, [1954] 1 All ER 893.

4 *Bothamley v Sherson*(1875) LR 20 Eq 304 at 308 per Jessel MR; *Robertson v Broadbent*(1883) 8 App Cas 812 at 815, HL, per Lord Selborne LC; and see *Dawson v Reid* (1915) 113 LT 52, HL; *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose*[1949] Ch 78, [1948] 2 All ER 971. Where a testator makes a bequest of an option to purchase shares forming part of his estate at less than market value but does not make any distinct bequest of the beneficial interest represented by the difference between the option price and the market value, the beneficial interest in question is not property specifically bequeathed: see PARA 422 note 3 ante. Savings certificates which are specifically bequeathed in a will or form part of the residuary estate or which are left by a holder who has died intestate may be transferred to the person beneficially entitled and need not be encashed: *Note*[1954] 1 All ER 519.

5 *Re Wedmore, Wedmore v Wedmore*[1907] 2 Ch 277. However, the guarantee of a bank overdraft would not normally be a 'debt' for this purpose: *Re Mitchell, Freelove v Mitchell*[1913] 1 Ch 201.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(i) Classification of Legacies/473. General legacies.

473. General legacies.

A general legacy may or may not be part of the testator's property: it has no reference to the actual state of his property, and is a gift of something which, if the testator leaves sufficient assets, must be raised by his executors out of his general personal estate. Whether or not a particular thing forms part of the testator's personal estate is a pure question of fact; so long as it is the testator's at his death it is capable of being specifically bequeathed¹. Whether or not it has been separated from the general personal estate depends upon the true construction of the will. In the case of real estate a devise, whether of a specific property or by way of residue, is specific².

1 *Fontaine v Tyler* (1821) 9 Price 94; *Stephenson v Dowson* (1840) 3 Beav 342. A gift of a sum of stock in round numbers, or even of a sum of stock in pounds and pence, being the exact amount possessed by the testator at the date of his death, is prima facie a general legacy (*Re Willcocks, Warwick v Willcocks* [1921] 2 Ch 327); but there may be clear indications, as gathered from the will and the surrounding circumstances, that the testator intended to dispose of the specific investments which he held: see *Re Hawkins, Public Trustee v Shaw* [1922] 2 Ch 569. See also *Re Gage, Crozier v Gutheridge* [1934] Ch 536; *Re O'Connor, Westminster Bank Ltd v O'Connor* [1948] Ch 628, [1948] 2 All ER 270.

2 *Hensman v Fryer* (1867) 3 Ch App 420; *Lancefield v Iggulden* (1874) 10 Ch App 136; cf para 418 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(i) Classification of Legacies/474. Demonstrative legacies.

474. Demonstrative legacies.

There is a third kind of legacy, called a demonstrative legacy, which consists of a pecuniary legacy payable out of a particular fund¹. Such a legacy has the following advantages: (1) it is not adeemed by the total or partial failure at the testator's death of the fund out of which it was directed to be paid, but becomes payable out of the general personal estate to the extent of such failure, *pari passu* with ordinary general legacies²; and (2) it does not abate with the general legacies until after the particular fund is exhausted³.

1 See *Dawson v Reid* (1915) 113 LT 52, HL (where a preference expressed by the testator that a pecuniary legacy given by the will should be taken from his insurance funds was held to make the legacy demonstrative); *Re Webster, Goss v Webster* [1937] 1 All ER 602, CA.

2 *Roberts v Pocock* (1798) 4 Ves 150; *Mann v Copland* (1817) 2 Madd 223; *Fowler v Willoughby* (1825) 2 Sim & St 354. As to the ademption of legacies by the failure of the subject matter of the gift see WILLS vol 50 (2005 Reissue) PARA 471 et seq; and see EQUITY vol 16(2) (Reissue) PARA 739 et seq.

3 *Mullins v Smith* (1860) 1 Drew & Sm 204.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(i) Classification of Legacies/475. Executor's duty to give notice.

475. Executor's duty to give notice.

The trustee of an express trust is under a duty to inform a beneficiary that he has an interest under the terms of the trust but is not obliged to go to the length of giving legal advice as to the nature of the interest¹. Whether an executor is under a similar duty is more doubtful, but it would appear that, although he is clearly under no obligation to give notice to a legatee of conditions attached to his legacy², he may be under a duty similar to that of the trustee of an express trust³ to notify a legatee of the existence of the legacy if it is not already known to him⁴.

1 *Hawksley v May* [1956] 1 QB 304, [1955] 3 All ER 353 (duty of trustees of settlement to inform beneficiary on his attaining his majority of his interest in capital and income of trust funds). See also *Brittlebank v Goodwin* (1868) LR 5 Eq 545 (duty of the trustee's administrator); *Burrows v Walls* (1855) 5 De GM & G 233.

2 *Chauncy v Graydon* (1743) 2 Atk 616; *Re Lewis, Lewis v Lewis* [1904] 2 Ch 656, CA; *Re Mackay, Mackay v Gould* [1906] 1 Ch 25; *Hawksley v May* [1956] 1 QB 304 at 322, [1955] 3 All ER 353 at 362 per Havers J.

3 See the text and note 1 supra; and TRUSTS vol 48 (2007 Reissue) PARAS 951, 956, 962, 975.

4 See *Wroe v Seed* (1863) 4 Giff 425 at 429; *Brittlebank v Goodwin* (1868) LR 5 Eq 545.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/476. Payment within the executor's year.

(ii) Payment

476. Payment within the executor's year.

In general a personal representative¹ is not bound to distribute the deceased's estate before the expiration of one year from the death².

The executor has a year within which fully to inform himself of the state of the testator's property³, and during that period he cannot be required to pay any legacies, even though they are expressly directed by the testator to be payable within the year⁴; he is entitled to pay them within the year if he chooses⁵.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 Administration of Estates Act 1925 s 44. See also PARA 379 ante.

3 As to the payment of debts cf para 384 ante.

4 *Pearson v Pearson* (1802) 1 Sch & Lef 10; *Wood v Penoyre* (1807) 13 Ves 325 at 333; *Benson v Maude* (1821) 6 Madd 15. See also *Re Smith, Dowzer v Dowzer* (1914) 48 ILT 236; *Re Lord Llangattock, Johnson v Church of England Central Board of Finance* (1918) 34 TLR 341.

5 *Garthshore v Chalie* (1804) 10 Ves 1 at 13; *Angerstein v Martin* (1823) Turn & R 232 at 241. As to the ascertainment of residue see PARA 534 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/477. Pending proceedings for family provision.

477. Pending proceedings for family provision.

A personal representative distributes the estate at his own risk if proceedings are pending for family provision or otherwise¹ or if the period of six months from the grant of representation, during which an application for family provision must normally be made², is not yet expired and there is any possibility or expectation that an application may be made³.

1 Ie under the Inheritance (Provision for Family and Dependants) Act 1975: see PARA 665 et seq post.

2 See PARA 697 post.

3 See *Re Simson, Simson v National Provincial Bank Ltd* [1950] Ch 38 at 42-43, [1949] 2 All ER 826 at 829 per Vaisey J. Personal representatives are not, however, liable for having distributed any part of the estate of the deceased after the expiration of the six month period on the ground that they ought to have taken into account the possibility that the court might exercise its power (see PARAS 697-698 post) to extend the period or vary its order, but this provision is without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under the Inheritance (Provision for Family and Dependants) Act 1975: see s 20(1); and PARAS 683, 697 post. As to the right to follow assets see PARA 514 et seq post. For restrictions on the disposal of a matrimonial home in the case of an intestacy see PARA 594 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/478. Adopted and illegitimate children.

478. Adopted and illegitimate children.

A personal representative is not under a duty, by virtue of the law relating to the administration of estates, to inquire, before conveying or distributing any property, whether:

- (1) any adoption¹ has been effected or revoked²; or
- (2) any person is illegitimate, or is adopted by one of his natural parents, and could be legitimated³ (or if deceased be treated as legitimated)⁴,

if that fact could affect entitlement to property⁵. Nor is a personal representative liable to any person by reason of a conveyance or distribution of the property made without regard to any such fact if he has not received notice of the fact before the conveyance or distribution⁶.

These provisions, which apply from 1 January 1988⁷ in the case of adoption, and 22 August 1976⁸ in the case of legitimacy, do not prejudice the right of a person to follow the property, or any property representing it, into the hands of another person, other than a purchaser, who has received it⁹. Nor does the repeal of the former law¹⁰ on those dates affect the application of that law in relation to a disposition of property effected by an existing¹¹ instrument¹².

1 For the meaning of 'adoption' see the Adoption Act 1976 s 38(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 375. As to adoption see generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 323 et seq.

2 Ibid s 45(1). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 378.

3 For the meaning of 'legitimated person' see the Legitimacy Act 1976 s 10(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125.

4 Ibid s 7(1).

5 Adoption Act 1976 s 45(1); Legitimacy Act 1976 s 7(1). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 378.

6 Adoption Act 1976 s 45(2); Legitimacy Act 1976 s 7(2). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 378.

7 See the Adoption Act 1976 s 74(2); and the Adoption Act (Commencement No 2) Order 1987, SI 1987/1242.

8 See the Legitimacy Act 1976 s 12(2).

9 Adoption Act 1976 s 45(3); Legitimacy Act 1976 s 7(3). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 378. As to following assets see EQUITY vol 16(2) (Reissue) PARA 861 et seq.

10 As to the former law see the Adoption Act 1958 s 17(3); and the Adoption Act 1964 s 1(1) (both repealed by the Children Act 1975 s 108(1)(b), Sch 4) under which a personal representative could convey or distribute property to or among the people entitled to it without having ascertained that no adoption order had been made by virtue of which some other person might be entitled to an interest in the property, and was not liable to any person so entitled if he had no notice of the claim at the time of the conveyance or distribution.

11 For these purposes, 'existing' means made before 1 January 1976: Adoption Act 1976 s 72(1); Legitimacy Act 1976 s 10(1). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 379. For these purposes: (1) a will or codicil is regarded as being made at the date of the testator's death (Legitimacy Act 1976 s 10(3)(a); Adoption Act 1976 s 46(3)); (2) an oral disposition of property is deemed to be contained in an instrument made when the disposition was made (Legitimacy Act 1976 s 10(3)(b); Adoption Act 1976 s 46(2)); and (3) provisions of the law of intestate succession applicable to the estate of a deceased person must be treated as if contained in an instrument executed by him (while of full capacity) immediately before his death (Legitimacy Act 1976 s 5(2); Adoption Act 1976 s 46(4)). For the meaning of 'disposition' see s 46(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 379. As to wills and codicils see WILLS vol 50 (2005 Reissue) PARA 301.

12 Legitimacy Act 1976 s 5(1); Adoption Act 1976 s 42(1). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 379.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/479. Receipts and machinery of payment.

479. Receipts and machinery of payment.

An executor is entitled to a receipt on payment of a legacy, and this is a sufficient discharge, so that he is only in exceptional circumstances entitled to a formal deed of release¹.

The currency in which a legacy should be paid is decided by the testator's intention².

1 *Re Roberts' Trusts* (1869) 38 LJ Ch 708; *Munro v Fitzgerald* (1844) 3 LTOS 3. As to release by deed see PARA 480 post; and TRUSTS vol 48 (2007 Reissue) PARA 925. A foreign consular officer may in certain cases give a valid discharge on behalf of a foreign national resident abroad: see the Consular Conventions Act 1949 s 1(2); and PARA 210 ante.

2 As to the testator's intention see WILLS vol 50 (2005 Reissue) PARA 513 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/480. Formal deed of release.

480. Formal deed of release.

Personal representatives are only entitled to be discharged upon the distribution of the residuary estate and not before¹. It is usual in a complicated case for a formal deed of release containing proper recitals to be executed by the persons entitled to the residue, although in simple cases they merely sign the residuary accounts. Where the personal representatives are required to deal with the property otherwise than in accordance with the will or the rights of the beneficiaries they can legally demand from beneficiaries a deed of release². Where personal representatives or trustees are entitled to receive the residue, a receipt under seal cannot be demanded³.

1 *Tiger v Barclays Bank Ltd* [1951] 2 KB 556, [1951] 2 All ER 262; affd [1952] 1 All ER 85, CA. As to the residuary estate under a will see WILLS vol 50 (2005 Reissue) PARA 589.

2 *King v Mullins* (1852) 1 Drew 308; *Chadwick v Heatley* (1845) 2 Coll 137. See also PARA 479 text and note 1 ante.

3 *Re Cater's Trusts (No 2)* (1858) 25 Beav 366 at 367; *Re Hoskin's Trusts* (1877) 5 ChD 229 at 234.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/481. Annuities.

481. Annuities.

An annuity given by will prima facie runs from the testator's death¹, but in the absence of a direction to the contrary², the first instalment does not become due until the expiration of the year, nor does a sum of money directed to be invested in the purchase of an annuity carry interest before the expiration of the year³.

An annuitant is not entitled to have the residuary estate kept in hand to meet his annuity; he is only entitled to such security as will make it practically certain that his annuity will be paid in full⁴.

Money bequeathed to be invested in the purchase of an annuity for the legatee's life is a vested legacy, and the legatee may either take the sum or have it laid out in an annuity. Should the legatee survive the testator but die before the money is laid out, or even before the fund is available (for example during the life of a person after whose death the investment is to be made)⁵ it is still a vested legacy, and may be claimed by his personal representatives⁶. The same principle applies to a direction to purchase an annuity of a particular amount. The right to take its value in cash instead of the annual payment vests in the annuitant on the testator's death, and, should the annuitant die before the annuity is purchased, his personal representatives are entitled to such a sum as would, at the testator's death, have purchased the annuity⁷.

1 *Gibson v Bott* (1802) 7 Ves 89 at 96; *Stamper v Pickering* (1838) 9 Sim 176. As to annuities generally see RENTCHARGES AND ANNUITIES.

2 *Houghton v Franklin* (1823) 1 Sim & St 390; *Irvin v Ironmonger* (1831) 2 Russ & M 531.

3 *Re Friend, Friend v Young (No 2)* (1898) 78 LT 222.

4 *Re Parry, Scott v Leak* (1889) 42 ChD 570; see also *Harbin v Masterman* [1896] 1 Ch 351, CA. As to whether an annuity is charged on capital as well as income see RENTCHARGES AND ANNUITIES.

5 *Bayley v Bishop* (1803) 9 Ves 6.

6 *Yates v Compton* (1725) 2 P Wms 308; *Barnes v Rowley* (1797) 3 Ves 305; *Palmer v Craufurd* (1819) 3 Swan 483. The setting aside by the court of a fund to meet annuities or legacies charged on residuary estate is an act of administration only, and does not release the residue from the charge: *Re Evans and Bettell's Contract* [1910] 2 Ch 438. As to vesting see WILLS vol 50 (2005 Reissue) PARA 696 et seq.

7 *Dawson v Hearn* (1831) 1 Russ & M 606; *Re Robbins, Robbins v Legge* [1907] 2 Ch 8, CA; *Brown's Trustees v Thom* (1915) 53 SLR 59. When the annuitant dies before the purchase of the annuity, but after payment to him of instalments of the annuity, his representatives are entitled to such a sum as would have purchased the annuity on the date of the payment of the last instalment, together with interest on that sum from that date, even though the date falls within a year of the testator's death: *Re Brunning, Gammon v Dale* [1909] 1 Ch 276. See further RENTCHARGES AND ANNUITIES.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/482. Contingent legacies.

482. Contingent legacies.

The right of a contingent legatee¹ is limited in a manner similar to that of an annuitant². His only right is to have security for the payment of his legacy if the contingency arises³. If an executor, without going to the court, can prove that he has acted reasonably, and that he has set apart an ample sum to answer the legacy and has invested it, and has then proceeded to distribute the residue, he will not be held personally liable to make good the loss if it should turn out that the sum so retained is not sufficient to answer the contingent legacy⁴.

1 As to contingent legatees see PARA 502 post.

2 As to annuitants see PARA 481 ante.

3 *Webber v Webber* (1823) 1 Sim & St 311; *King v Malcott* (1852) 9 Hare 692.

4 *Re Hall, Foster v Metcalfe* [1903] 2 Ch 226 at 233, CA, per Romer LJ; *Re Oswald, Oswald v Oswald* (1919) 64 Sol Jo 242.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/483. Preservation of specific legacies.

483. Preservation of specific legacies.

An executor should, so far as possible, preserve articles specifically bequeathed and, unless compelled, he ought not to apply them in payment of debts¹. The cost of getting in a legacy specifically bequeathed ought to be borne by the general estate², but sums paid after assent in the discharge of foreign taxes and costs incurred in connection with them³, and the cost of

warehousing and preserving, pending an assent, articles specifically bequeathed, in the absence of a direction to the contrary, ought to be borne by the specific legatee⁴. Similarly, the costs of inquiries to ascertain the person entitled to a legacy or otherwise incurred in relation to the legacy are borne by that legacy unless the court otherwise directs⁵; but the general estate will bear costs occasioned by difficulties of interpretation of the will⁶.

1 *Clarke v Earl of Ormonde* (1821) Jac 108. Subject to the payment of debts the specific legatee is entitled to call upon the personal representatives to pay or transfer to him the subject matter of the legacy in due course of administration: *Re Stratton's Disclaimer* [1958] Ch 42 at 54 per Jenkins LJ. See also *IRC v Hawley* [1928] 1 KB 578; *Re Parsons, Parsons v A-G* [1943] Ch 12; *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, [1962] 2 All ER 335, CA; *Kavanagh v Best* [1971] NI 89. See also PARA 566 et seq post.

2 *Perry v Meddowcroft* (1841) 4 Beav 197, 204. As to the provision for relief from duty and value added tax in respect of imported legacies see the Customs and Excise Duties (General Reliefs) Act 1979 s 7 (as substituted); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 864.

3 *Re De Sommersy, Coelenbier v De Sommersy* [1912] 2 Ch 622.

4 *Re Rooke, Jeans v Gatehouse* [1933] Ch 970 (following *Re Pearce, Crutchley v Wells* [1909] 1 Ch 819; not following *Sharp v Lush* (1879) 10 ChD 468); and see *Re Wilson, Wilson v Mackay* [1967] Ch 53 at 65, [1966] 2 All ER 867 at 870 per Pennycuik J. The costs of putting a specific legatee in possession of his specific legacy, such as the cost of packing and transporting to England chattels situated abroad, or the cost of transferring shares or mortgages, should, it would seem, be borne by the legatee: see *Re Scott, Scott v Scott* [1915] 1 Ch 592, CA; *Re Grosvenor, Grosvenor v Grosvenor* [1916] 2 Ch 375; *Re Fitzpatrick, Bennett v Bennett* [1952] Ch 86, [1951] 2 All ER 949; but see *Re Hewett, Eldridge v Hewett* (1920) 90 LJ Ch 126; *Re Sivewright, Law v Fenwick* (1922) 128 LT 416; *Re Leach, Milne v Daubeny* [1923] 1 Ch 161 (the two last-cited cases being cases where the estate was insufficient to pay the pecuniary legacies in full). Where the will enabled beneficiaries to select items, the cost of storing and insuring those items before selection fell on income arising from residue and not on the beneficiaries: *Re Collins's Settlement Trusts, Donne v Hewetson* [1971] 1 All ER 283, sub nom *Re Collins' Will Trusts, Donne v Hewetson* [1971] 1 WLR 37. As to the costs after an assent see PARA 432 ante.

5 As to the reasons for which such a direction may be given see *Re Whitaker, Denison-Pender v Evans* [1911] 1 Ch 214; *Re Townend, Knowles v Jessop* [1914] WN 145; *Re Vincent, Rohde v Palin* [1909] 1 Ch 810.

6 *Re Hall-Dare, Le Marchant v Lee Warner* [1916] 1 Ch 272.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/484. Absolute bequest with directions as to application.

484. Absolute bequest with directions as to application.

Where there is a bequest of money to or in trust for a legatee absolutely, but with a direction for the enjoyment or application of the money in a particular mode, for example towards purchasing a house in the country, the legatee is entitled to receive the money regardless of the particular mode directed for its enjoyment or application¹.

1 *Knox v Lord Hotham* (1845) 15 Sim 82; *Lassence v Tierney* (1849) 1 Mac & G 551; *Re Skinner's Trusts* (1860) 1 John & H 102. See also *Barlow v Grant* (1684) 1 Vern 255; *Nevill v Nevill* (1701) 2 Vern 431. As to the right of a minor to a sum directed to be applied in placing him out as an apprentice see *Barton v Cooke* (1800) 5 Ves 461 at 463.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/485. Payment of vested gift not to be postponed.

485. Payment of vested gift not to be postponed.

Where a legatee takes an absolute vested¹ interest in a sum of money on attaining the age of majority, a direction that the sum is not to be paid to him², or is to be accumulated³ until a subsequent period, is to be disregarded, unless during the interval the property is given to another. The principle is equally applicable where the legatee is a charity, corporate or unincorporate⁴.

1 As to vesting see WILLS vol 50 (2005 Reissue) PARA 696 et seq.

2 *Curtis v Lukin* (1842) 5 Beav 147 at 155; *Rocke v Rocke* (1845) 9 Beav 66; *Re Johnston, Mills v Johnston* [1894] 3 Ch 204; *Re Couturier, Couturier v Shea* [1907] 1 Ch 470.

3 *Josselyn v Josselyn* (1837) 9 Sim 63; *Saunders v Vautier* (1841) 4 Beav 115; *Gosling v Gosling* (1859) John 265. In *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192, CA, it was held that the right of a legatee absolutely entitled to a share of residue to have a transfer of his share ought, in the absence of special circumstances, to prevail over the discretion of trustees to postpone conversion.

4 *Harbin v Masterman* [1894] 2 Ch 184, CA; affd sub nom *Wharton v Masterman* [1895] AC 186, HL. See also CHARITIES.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/486. Limitation of proceedings for recovery.

486. Limitation of proceedings for recovery.

Subject to special provisions relating to actions in respect of trust property¹, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) may be brought after the expiration of 12 years from the date when the right accrued².

1 Ie subject to the Limitation Act 1980 s 21(1), (2): see LIMITATION PERIODS vol 68 (2008) PARA 1140.

2 See ibid s 22; and LIMITATION PERIODS vol 68 (2008) PARA 1161.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(ii) Payment/487. Payment of legacy to bankrupt or person under disability.

487. Payment of legacy to bankrupt or person under disability.

Payment of a legacy to a bankrupt legatee without notice of his bankruptcy before the trustee in bankruptcy has intervened is good¹.

Payment of a legacy cannot safely be made to a person who is known to the executor to be incapable of managing his affairs by reason of mental disorder², but a personal representative can obtain a good receipt from an appointed receiver³. A legacy should not be paid to a minor⁴.

1 *Re Ball* [1899] 2 IR 313, CA; *Cohen v Mitchell* (1890) 25 QBD 262, CA. As to the powers of the trustee in bankruptcy to intervene see the Insolvency Act 1986 s 307; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 445.

2 See MENTAL HEALTH vol 30(2) (Reissue) PARA 596 et seq. The executors may obtain a good discharge by payment into court in the Chancery Division: *Re Parker's Will* (1888) 39 ChD 303, CA. See also PARA 464 ante; and TRUSTS vol 48 (2007 Reissue) PARA 917. If the executors properly and honestly appropriate and set apart the legacy and invest and accumulate the dividends after appropriation they are free from responsibility in the case of an adult legatee suffering from mental disorder: *Pothecary v Pothecary* (1848) 2 De G & Sm 738.

3 See the Mental Health Act 1983 s 99; and MENTAL HEALTH vol 30(2) (Reissue) PARAS 682, 704.

4 See PARA 493 et seq post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(iii) Legacies to Debtors/488. General legatee must bring debt into account.

(iii) Legacies to Debtors

488. General legatee must bring debt into account.

Where the legatee of a general legacy¹ or share of residue² is a debtor to the estate, he is not entitled to receive his legacy without bringing his debt into account³.

This principle is not applicable in the case of a specific devisee or of a specific legatee of leaseholds or chattels⁴, but is applicable where the specific legacy is represented by a sum of money in the hands of the executor⁵. It is not applicable to a legacy which has been appropriated by the executor for the legatee⁶.

It applies even though the legacy has been incumbered⁷, or the debt is statute-barred⁸. It does not apply where the legacy is, but the debt is not, immediately payable⁹, or where the legatee is the executor and residuary legatee of a person indebted to the testator on a statute-barred debt¹⁰.

The principle is equally applicable in the case of a debtor claiming a distributive share of the estate under an intestacy¹¹.

1 As to general legacies see PARA 473 ante.

2 As to the residuary estate see PARA 531 et seq post.

3 See *Cherry v Boulton* (1839) 4 My & Cr 442; *Re Akerman, Akerman v Akerman* [1891] 3 Ch 212. For a wider application of the principle see *Re Rhodesia Goldfields Ltd, Partridge v Rhodesia Goldfields Ltd* [1910] 1 Ch 239 at 246; *Re Dacre, Whitaker v Dacre* [1916] 1 Ch 344 at 347, CA; *Selangor United Rubber Estates Ltd v Cradock (No 4)* [1969] 3 All ER 965 at 972, [1969] 1 WLR 1773 at 1778 per Ungood-Thomas J. The principle does not apply where the debt is owing by a partnership firm of which the legatee is a member (*Turner v Turner* [1911] 1 Ch 716, CA), nor, as a general rule, where the debt is owing, not to the testator, but to a firm in which the testator was a partner (*Jackson v Yeats* [1912] 1 IR 267). As to the nature of the principle see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 559. As to equitable set-off see EQUITY vol 16(2) (Reissue) PARAS 901-905; and as to set-off generally see CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq. As to

satisfaction of debts by legacies see EQUITY vol 16(2) (Reissue) PARAS 751-753. As to legacies generally see WILLS. As to retainer by a trustee against a beneficiary see TRUSTS vol 48 (2007 Reissue) PARA 923.

4 *Re Akerman, Akerman v Akerman*[1891] 3 Ch 212; *Re Savage, Cull v Howard*[1918] 2 Ch 146. As to specific legacies see PARA 472 ante.

5 *Re Taylor, Taylor v Wade*[1894] 1 Ch 671.

6 *Ballard v Marsden*(1880) 14 ChD 374.

7 *Re Knapman, Knapman v Wreford*(1881) 18 ChD 300, CA.

8 *Courtney v Williams* (1846) 15 LJ Ch 204; *Coates v Coates* (1864) 33 Beav 249; *Gee v Liddell (No 2)* (1866) 35 Beav 629; *Re Cordwell's Estate, White v Cordwell*(1875) LR 20 Eq 644. See also *Dingle v Coppen, Coppen v Dingle*[1899] 1 Ch 726.

9 *Re Rees, Rees v Rees* (1889) 60 LT 260 (debt not accruing due until after time for payment of legacy); *Re Abrahams, Abrahams v Abrahams*[1908] 2 Ch 69 (debt payable by instalments due at one year after death).

10 *Re Bruce, Lawford v Bruce*[1908] 2 Ch 682, CA.

11 *Re Cordwell's Estate, White v Cordwell*(1875) LR 20 Eq 644. The principle was not, however, applicable to the case of a debtor who was his creditor's heir: *Re Milnes, Milnes v Sherwin* (1885) 53 LT 534. As to distribution on intestacy see PARA 583 et seq post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(iii) Legacies to Debtors/489. Effect of legatee's bankruptcy.

489. Effect of legatee's bankruptcy.

Where the legatee has become bankrupt in the testator's lifetime the right to have debts brought into account¹ cannot be exercised by the executor, except to the extent of a dividend or composition payable in the bankruptcy². Where the legatee's bankruptcy is subsequent to the testator's death, the right can be exercised in full unless the executor has chosen to prove in the bankruptcy³.

1 See *Cherry v Boulton* (1839) 4 My & Cr 442; *Re Hodgson, Hodgson v Fox* (1878) 9 ChD 673; and PARA 488 ante.

2 See *Re Watson, Turner v Watson* [1896] 1 Ch 925; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 559.

3 See *Re Watson, Turner v Watson* [1896] 1 Ch 925; *Stammers v Elliott* (1868) 3 Ch App 195; *Armstrong v Armstrong* (1871) LR 12 Eq 614; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 561.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(iv) Legacies to Executors/490. Presumption that legacy is given to executor as such.

(iv) Legacies to Executors

490. Presumption that legacy is given to executor as such.

The presumption is that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the will, to repel that presumption¹, if he does not act as executor and yet claims the legacy². Where in the gift the testator has designated the executor-legatee as a friend³ or as a relation⁴, or where the legacy is expressed to be given as a mark of respect⁵ or as a remembrance⁶, the presumption is rebutted. It is also rebutted where the legacy is one of residue⁷, or is given to the executor after the death of the tenant for life under the will⁸; but a difference either in the nature or amount of the legacy given to one executor as compared with those given to other executors is not as a general rule of itself sufficient to show that the gift is not attached to the office⁹.

If a gift is made to an executor to be disposed of in accordance with a separate memorandum, but not so as to create any trust, the question whether the executor takes absolutely and beneficially is one of construction¹⁰.

1 Williams and Mortimer on Executors 31, approved in *Re Appleton, Barber v Tebbit*(1885) 29 ChD 893 at 895, CA, per Cotton LJ. In *Re Appleton, Barber v Tebbit* supra at 895, Cotton LJ added that he thought parol evidence was admissible to rebut the presumption, but Fry LJ at 898 expressly abstained from concurring in that view. In the cases of *Piggott v Green* (1833) 6 Sim 72 and *Calvert v Sebbon* (1841) 4 Beav 222 the legacy was held to be annexed to the office. In *Wildes v Davies* (1853) 1 Sm & G 475; *Brand v Chaddock* (1871) 24 LT 347; and *Re Bunbury's Trusts* (1876) 10 IR Eq 408, the legacy was held to be not so attached. A request that a handsome gratuity should be given to the executor is void for uncertainty: *Jubber v Jubber* (1839) 9 Sim 503. As to the rights of an executor on a partial intestacy see PARA 618 post.

2 See the text to notes 3-10 infra. As to executors in professional practice see PARA 40 ante.

3 *Re Denby* (1861) 3 De GF & J 350. It is easier to infer an intention that a sole trustee is to take than that two or more trustees are to do so: *Re Pugh's Will Trusts, Marten v Pugh*[1967] 3 All ER 337 at 341, [1967] 1 WLR 1262 at 1267 per Pennycuik J.

4 *Compton v Bloxham* (1845) 2 Coll 201 at 203; *Dix v Reed* (1823) 1 Sim & St 237.

5 *Burgess v Burgess* (1844) 1 Coll 367.

6 *Bubb v Yelverton*(1871) LR 13 Eq 131.

7 *Re Maxwell, Eivers v Curry*[1906] 1 IR 386, CA, following *Griffiths v Pruett* (1840) 11 Sim 202.

8 *Re Reeve's Trusts*(1877) 4 ChD 841.

9 *Re Appleton, Barber v Tebbit*(1885) 29 ChD 893 at 896, CA, per Cotton LJ, commenting upon *Jewis v Lawrence*(1869) LR 8 Eq 345.

10 *Re Stirling, Union Bank of Scotland Ltd v Stirling*[1954] 2 All ER 113, [1954] 1 WLR 763. See also WILLS vol 50 (2005 Reissue) PARA 655. If the executor is a solicitor who has prepared the will there must be a strong presumption against his taking beneficially: *Re Rees's Will Trusts, Williams v Hopkins*[1950] Ch 204, [1949] 2 All ER 1003, CA; *Re Pugh's Will Trusts, Marten v Pugh*[1967] 3 All ER 337, [1967] 1 WLR 1262.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(iv) Legacies to Executors/491. When executor is entitled to a legacy.

491. When executor is entitled to a legacy.

Where a legacy is attached to the office, an executor who does not act is not entitled to the benefit¹, even though he is prevented from acting by age or infirmity². It is sufficient if the

executor has in fact done something showing an intention to act as executor, even though he has not proved the will³; and where an executor who has proved the will and acted in the administration of the estate renounces the trusteeship after administration he is nevertheless entitled to a legacy given on condition that he proves the will and accepts the trusteeship⁴. An annuity given to an executor for his trouble does not cease by reason of the institution of administration proceedings⁵.

A legacy to an executor, although attached to the office, stands upon the same footing as ordinary legacies; it was subject to legacy duty⁶ before that duty was abolished⁷, and is liable to abatement⁸.

1 *Abbot v Massie* (1796) 3 Ves 148 at 149; *Slaney v Watney* (1866) LR 2 Eq 418. Where the legacy is attached to the office, a revocation by codicil of the appointment of the executor also revokes the legacy: *Re Russell, Public Trustee v Campbell* (1912) 56 Sol Jo 651.

2 *Hanbury v Spooner* (1843) 5 Beav 630; *Re Hawkin's Trusts* (1864) 33 Beav 570.

3 *Harrison v Rowley* (1798) 4 Ves 212; *Lewis v Mathews* (1869) LR 8 Eq 277. Conversely, an executor who proves without any intention of acting may be disallowed the legacy: *Harford v Browning* (1787) 1 Cox Eq Cas 302.

4 *Re Sharman's Will Trusts, Public Trustee v Sharman* [1942] Ch 311, [1942] 2 All ER 74.

5 *Baker v Martin* (1836) 8 Sim 25. As to administration proceedings see PARA 705 et seq post.

6 *Re Thorley, Thorley v Massam* [1891] 2 Ch 613, CA.

7 See PARAS 552-553 post.

8 *Fretwell v Stacy* (1702) 2 Vern 434; *Duncan v Watts* (1852) 16 Beav 204; *Debney v Eckett* (1858) 4 Jur NS 805. As to abatement see PARA 506 et seq post. As to the authority to make professional charges see PARA 43 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(iv) Legacies to Executors/492. Lien on defaulting executor's interest.

492. Lien on defaulting executor's interest.

Where an executor who is also a beneficiary is in default to his testator's estate, the estate is entitled to a lien on his beneficial interest¹. This lien is good not only against the executor himself but against his assignee², even though the wasting of the assets took place subsequently to the assignment³; and it applies not only to the beneficial interest taken by the executor directly under the will but to any interest to which he may have become entitled derivatively, for example as being one of the next of kin of a beneficiary who has died intestate⁴. An unpaid beneficiary has, however, no lien upon a specific legacy given to an executor⁵, and the lien will be discharged by the acceptance of a composition in the bankruptcy of the defaulting executor⁶.

1 *Barnett v Sheffield* (1852) 1 De GM & G 371; *Cole v Muddle* (1852) 10 Hare 186; *Re Carew, Carew v Carew* [1896] 1 Ch 527; affd [1896] 2 Ch 311, CA. As to lien generally see LIEN.

2 *Irby v Irby (No 3)* (1858) 25 Beav 632.

3 *Morris v Livie* (1842) 1 Y & C Ch Cas 380.

4 *Jacobs v Rylance* (1874) LR 17 Eq 341; *Doering v Doering* (1889) 42 ChD 203; *Re Dacre, Whitaker v Dacre* [1916] 1 Ch 344, CA. See also PARA 488 note 3 ante. As to intestacy see PARA 583 et seq post.

5 *Geary v Beaumont* (1817) 3 Mer 431. As to specific legacies see PARA 472 ante.

6 *Re Sewell, White v Sewell* [1909] 1 Ch 806. As to compositions in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 863.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(v) Legacies to Minors/493. Payment of legacy to minor.

(v) Legacies to Minors

493. Payment of legacy to minor.

In the absence of an express direction in the will an executor cannot safely pay a legacy to a minor until the minor attains his majority¹. A married minor may give a valid receipt for income and accumulations of income², but trustees still have a discretion to withhold payment until a married minor attains his majority if withholding is for the minor's benefit³.

A legacy bequeathed by a testator who dies domiciled in England may be paid to the legatee on his own receipt if he is of full age by the law of his domicile even though still a minor by English law⁴, and if he is under age according to both laws it will be paid to him when he comes of age according to either law, whichever happens first⁵. The court will not, however, pay a legacy to the father of a minor domiciled abroad as a matter of right and without evidence as to its application for his benefit, even if by the *lex loci* the father is entitled to receive the money as legal guardian⁶.

1 Toller's Law of Executors (7th Edn) 314. The age of majority is now 18: see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1. As to the duty to give a beneficiary information of his rights when he attains his majority see PARA 475 note 1 ante.

2 See the Law of Property Act 1925 s 21; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 12, 40.

3 *Re Somech, Westminster Bank Ltd v Phillips* [1957] Ch 165, [1956] 3 All ER 523.

4 *Re Hellman's Will* (1866) LR 2 Eq 363; *Re Schnapper* [1928] Ch 420; *Donohoe v Donohoe* (1887) 19 LR Ir 349. As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

5 *Re Hellman's Will* (1866) LR 2 Eq 363. Accordingly, neither law is held exclusive. In some cases it may be proper for the trustees to pay the legacy into court under the Trustee Act 1925 s 63 (as amended): see PARA 464 ante; and TRUSTS vol 48 (2007 Reissue) PARA 917 et seq.

6 *Re Chatard's Settlement* [1899] 1 Ch 712, explaining *Re Crichton's Trust* (1855) 24 LTOS 267; *Re Ferguson's Trust* (1874) 22 WR 762; *Re Brown's Trust* (1865) 12 LT 488.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(v) Legacies to Minors/494. Payment to parents and guardians.

494. Payment to parents and guardians.

At common law an executor cannot obtain a valid receipt from the minor's father¹. If, however, the minor, after attaining his majority, ratifies a payment made to his father, he cannot afterwards sue the executor².

A parent with parental responsibility³ or a properly appointed guardian⁴ can give a valid receipt for a legacy for a minor⁵.

1 *Holloway v Collins* (1675) 1 Cas in Ch 245, 1 Eq Cas Abr 300 (executor ordered to make payment to plaintiff on attaining his majority having previously paid the father who then died insolvent); *Dagley v Tolferry* (1715) 1 P Wms 285 (executor ordered to pay legacy to legatee's creditors having previously paid the father); *Rotherham v Fanshaw* (1748) 3 Atk 628 at 629.

2 *Cooper v Thornton* (1790) 3 Bro CC 96; affd 3 Bro CC 186.

3 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134.

4 Ie by a guardian appointed by the court (see *ibid* s 5(1), (2)), or, on the death of a parent with parental responsibility for the minor, by that parent (see s 5(3)), or by an existing guardian of the minor (see s 5(4)). Where the appointment is made other than by the court it must be made in writing and signed and dated: see s 5(5). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 144 et seq.

5 See the Children Act 1989 s 3(2), (3); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 40, 135; *M'Creight v M'Creight* (1849) 13 I Eq R 314 at 327 per Brady LC; *Bedell v Constable* (1668) Vaugh 177; *Re Cresswell* (1881) 45 LT 468. See further Waterworth 'Minor Solutions: Receipt Clauses under the Regime of the Children Act 1989' [1997] Private Client Business 37.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(v) Legacies to Minors/495. Discharge of personal representatives.

495. Discharge of personal representatives.

Personal representatives¹ are discharged if they obtain a valid receipt in respect of a legacy², but if that is not possible they may exercise their statutory power to pay the legacy into court³, or to appropriate any part of the real or personal estate⁴ of the testator in satisfaction of the legacy⁵. After exercising their power to appropriate the personal representatives hold the assets appropriated as trustees⁶. On an appointment of trustees during a minority⁷, the personal representatives as such are discharged from all further liability in respect of the devise, legacy, residue or share, which may be retained in its existing condition or state of investment, or may be converted into money, and the money may be invested in any authorised investment⁸.

1 Ie personal representatives in their capacity as trustees: see the Trustee Act 1925 s 68(1) PARA (17); and PARA 5 ante. For the meaning of 'personal representative' see s 68(1) PARA (9); and TRUSTS vol 48 (2007 Reissue) PARA 602.

2 See PARA 479 ante.

3 See the Trustee Act 1925 s 63(1), (2) (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 917. As to the jurisdiction of the county court see s 63A(3)(d) (as added); and PARA 465 ante. See also TRUSTS vol 48 (2007 Reissue) PARA 641. Payment in may give no better discharge than is otherwise available: *Re Elliot's Trusts* (1873) LR 15 Eq 194. If the payment in is unnecessary because other remedies are available the personal representatives will not necessarily be entitled to recover their costs out of the estate: *Re Hemings' Trusts* (1856) 3 K & J 40.

4 For the meaning of 'real estate' see PARA 3 note 1 ante.

5 See the Administration of Estates Act 1925 s 41(1) (as amended); and PARAS 573-574 post. Executors exercising this power are not liable for a subsequent devaluation of the appropriated share whereas prior to 1926 if an executor, wishing to distribute the residue, set aside and invested in proper securities an ample sum to answer an infant's legacy, he was nevertheless personally liable for any loss if the investment proved insufficient when the infant attained his majority: *Re Salamons, Public Trustee v Wortley* [1920] 1 Ch 290. See PARA 573 et seq post.

6 *Re Smith, Henderson-Roe v Hitchins* (1889) 42 ChD 302; *Re Adams, Verrier v Haskins* [1906] WN 220; *Re Gompertz Estate, Parker v Gompertz* (1910) 55 Sol Jo 76; *Re Ponder, Ponder v Ponder* [1921] 2 Ch 59; *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, sub nom *Re Cockburn Cockburn v Lewis* [1957] 2 All ER 522.

7 See PARA 496 post.

8 Administration of Estates Act 1925 s 42(1). The Trustee Act 1925 s 36 (as amended) may also be available to personal representatives: see *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, sub nom *Re Cockburn Cockburn v Lewis* [1957] 2 All ER 522; and Underhill and Hayton *Law of Trusts and Trustees* (15th Edn, 1995) 736.

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496. Appointment of trustees.

Where a minor is absolutely entitled, under the will¹ or on the intestacy² of a person, whenever that person died, to a devise or legacy, or to the residue of the deceased's estate, or any share in it, and that devise, legacy, residue or share is not under the deceased's will, if any, devised or bequeathed to trustees for the minor, the deceased's personal representatives³ may appoint a trust corporation⁴ or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of them) to be the trustee or trustees of the devise, legacy, residue or share for the minor, and to be trustees of any land⁵ devised or any land being or forming part of that residue or share for the purposes of the Settled Land Act 1925, and of the statutory provisions relating to the management of land during a minority⁶, and may execute or do any assurance or thing requisite for vesting the devise, legacy, residue or share in the trustee or trustees so appointed⁷.

1 For the meaning of 'will' see PARA 3 note 1 ante.

2 See note 7 infra.

3 For the meaning of 'personal representative' see PARA 4 ante.

4 For the meaning of 'trust corporation' see PARA 18 note 4 ante.

5 For the meaning of 'land' see PARA 364 note 1 post.

6 In the Settled Land Act 1925 s 102 (as amended): see SETTLEMENTS vol 42 (Reissue) PARAS 665-666; CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 54-55.

7 Administration of Estates Act 1925 s 42(1). This provision does not apply on an intestacy unless the minor is entitled to an absolute vested interest (*Re Yerburch, Yerburch v Yerburch* [1928] WN 208); and under an intestacy where the devolution of the intestate's estate is governed by English law it is no longer possible for a minor to become entitled to such an interest except on marriage (*Re Wilks, Keefer v Wilks* [1935] Ch 645 at 650; and see PARAS 604, 612 post). However, this provision also applies to estates regulated by foreign law and

therefore applies if under foreign law a minor takes such an interest: *Re Kehr, Martin v Foges* [1952] Ch 26, [1951] 2 All ER 812; and see *Chellaram v Chellaram* [1985] Ch 409, [1985] 1 All ER 1043.

As to the liability of a personal representative who before 1926 retained or sold any such devise, legacy, residue or share see the Administration of Estates Act 1925 s 42(2).

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THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(v) Legacies to Minors/497.
Maintenance out of income of legacy.

497. Maintenance out of income of legacy.

According to the practice of the Chancery Division, a minor¹ who is entitled, under the will of his parent, or of a person who stood to him in loco parentis, to a legacy contingently on his attaining his majority, is entitled to maintenance during his minority out of the income of the legacy, notwithstanding that the conditions as to the vesting or payment of the legacy are such that if he were in a different relation to the testator he would not be entitled to the income until attaining full age or the happening of some other event upon which the legacy was to become vested or payable². The legacy in such a case carries interest from the testator's death³ if the income available is sufficient and subject to any rules of court to the contrary⁴. This does not mean that in the case of a general legacy or a specific legacy under a will coming into operation before 1926⁵ the minor acquires a vested interest in the income. If he dies under the age of majority the surplus income not applied for maintenance does not pass to his representatives⁶. Where the testator has provided another fund for the maintenance of the child, so that the income of the legacy is not required for the purpose, the foregoing rule does not apply⁷; but the statutory power of maintenance⁸ out of a share of residue given to a minor contingently upon his attaining his majority does not disentitle him to maintenance out of the income of a pecuniary legacy given upon the same contingency⁹.

1 See note 2 *infra*.

2 *Re Bowlby, Bowlby v Bowlby* [1904] 2 Ch 685, CA; *Beckford v Tobin* (1749) 1 Ves Sen 308 at 310; *Cavendish v Mercer* (1776) 5 Ves 195n, LC; *Lomax v Lomax* (1805) 11 Ves 48; *Errington v Chapman* (1806) 12 Ves 20; *Re George* (1877) 5 ChD 837 at 843, CA, per James LJ. Where the contingency extends beyond attaining the age of majority, the consent of the remainderman may be required (*Fendall v Nash* (1779) 5 Ves 197n, LC; *Fairman v Green* (1804) 10 Ves 45; *Cannings v Flower* (1835) 7 Sim 523); or no interest may be payable (see *Re Abrahams, Abrahams v Bendon* [1911] 1 Ch 108); but see now the Trustee Act 1925 s 31(1)(ii) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 63. The principle does not apply to a legacy to an adult child or a legacy to trustees contingently for a child who is a minor: see PARA 500 post.

3 *Wilson v Maddison* (1843) 2 Y & C Ch Cas 372; *Re Stokes, Bowen v Davidson* [1928] Ch 716. See also the cases cited in PARA 498 note 3 post.

4 See the Trustee Act 1925 s 31(3); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 66.

5 Contingent specific gifts under wills coming into operation after 1925 carry the intermediate income: see PARA 502 post.

6 *Re Bowlby, Bowlby v Bowlby* [1904] 2 Ch 685, CA (where the whole law on this subject is discussed); *Re Ferguson, Curry v Bell* (1915) 49 ILT 110. The allowance of income on a contingent legacy is an exception to the general rule: see PARA 502 post. The court may in a proper case draw from the terms of the will an inference that income is to be allowed on a legacy to a child contingent on the attainment of an age greater than the legal age of majority: see *Re Abrahams, Abrahams v Bendon* [1911] 1 Ch 108; *Re Jones, Meacock v Jones* [1932] 1 Ch 642.

7 *Re George* (1877) 5 ChD 837 at 843, CA, per James LJ; *Re Rouse's Estate* (1852) 9 Hare 649; *Re West, Westhead v Aspland* [1913] 2 Ch 345; *Re Stewart, Stewart v Bosanquet* (1913) 57 Sol Jo 646; *Beckford v Tobin*

(1749) 1 Ves Sen 308 at 310; *Donovan v Needham* (1846) 9 Beav 164; *Re Moody, Woodroffe v Moody* [1895] 1 Ch 101 at 106 et seq; *Re Abrahams, Abrahams v Bendon* [1911] 1 Ch 108. The rule nevertheless applies if the court can find an intention that the testator intended to provide maintenance, eg where he authorised his trustees to provide a home for his children: *Re Jones, Meacock v Jones* [1932] 1 Ch 642; and see *Re Stokes, Bowen v Davidson* [1928] Ch 716. Where a father bequeathed a legacy to his daughter in case she should attain full age, and made no provision for her maintenance between marriage under age and attainment of full age, interest was allowed on the legacy between the time of her marrying under age and attaining full age: *Chambers v Goldwin* (1805) 11 Ves 1.

8 As to the statutory power of maintenance see PARA 498 note 10 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 61-63.

9 *Re Moody, Woodroffe v Moody* [1895] 1 Ch 101.

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498. Legacy to minor who is not the testator's child.

If the minor is not the child of the testator or one to whom the testator stood in loco parentis, a legacy given contingently upon his attaining his majority stands upon the same footing as an ordinary contingent legacy; it does not (save as otherwise provided by statute) carry the intermediate income unless there is a direction in the will that it should be set apart¹.

Where the income of a legacy is given for the maintenance or education² of a minor, the legacy carries interest from the testator's death³ even if the minor is not a child of the testator⁴. Where the income is given to an adult subject to an obligation to maintain minors, the legacy does not carry interest from the death⁵, but if income is given to an adult to enable him to maintain his children the legacy may carry interest from the death if such an intention can be gathered from the will⁶.

Once the estate has been cleared and the residue ascertained, both executors⁷ and administrators⁸ who hold property belonging to a minor are trustees⁹ for the purpose of exercising the statutory powers of trustees relating to the maintenance of minors¹⁰.

1 See PARA 502 post; and *Re Dickson, Hill v Grant* (1885) 29 ChD 331, CA; *Re Reade-Revell, Crellin v Melling* [1930] 1 Ch 52. See also *Re Raine, Tyerman v Stansfield* [1929] 1 Ch 716. If a share of residue is given absolutely to a minor contingently on his attaining his majority, the minor will be entitled to both capital and arrears of income on attaining his majority: see *Re Bowlby, Bowlby v Bowlby* [1904] 2 Ch 685 at 711, CA, per Cozens-Hardy LJ.

2 *Re Selby-Walker, Public Trustee v Selby-Walker* [1949] 2 All ER 178.

3 *Harvey v Harvey* (1722) 2 P Wms 21; *Haughton v Harrison* (1742) 2 Atk 329 at 330 per Lord Hardwicke LC; *Beckford v Tobin* (1749) 1 Ves Sen 308 at 310 per Lord Hardwicke LC; *Crickett v Dolby* (1795) 3 Ves 10 at 13 per Arden MR; *Hill v Hill* (1814) 3 Ves & B 183; *Pett v Fellows* (1733) 1 Swan 561n. A posthumous child is only entitled to interest from his birth: *Rawlins v Rawlins* (1796) 2 Cox Eq Cas 425.

4 *Pett v Fellows* (1733) 1 Swan 561n; *Leslie v Leslie* (1835) L & G temp Sugd 1; *Re Richards* (1869) LR 8 Eq 119; *Re Churchill, Hiscock v Lodder* [1909] 2 Ch 431; *Re Stokes, Bowen v Davidson* [1928] Ch 716.

5 *Re Crane, Adams v Crane* [1908] 1 Ch 379 (income given to daughter-in-law to maintain herself and testator's grandchildren).

6 *Re Ramsay, Thorpe v Ramsay* [1917] 2 Ch 64 (income given to widow to maintain herself and testator's children). See also *Raven v Waite* (1818) 1 Swan 553 at 559 (sum given to provide maintenance for separated wife of testator's nephew with separate allowance on condition of maintaining her children).

7 *Re Smith, Henderson-Roe v Hitchins* (1889) 42 ChD 302.

8 *Re Adams, Verrier v Haskins* [1906] WN 220.

9 For the meaning of 'trustee' see the Trustee Act 1925 s 68(1) PARA (17); and PARA 5 ante.

10 See *ibid* s 31(1) (as amended) (replacing, as respects instruments coming into operation after 1925, the Conveyancing Act 1881 s 43 (repealed)); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 63-66. As to the application of the statutory power of maintenance where a minor is entitled to a contingent interest under an intestacy see the Administration of Estates Act 1925 s 47(1)(ii); and PARA 605 post. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 66.

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(vi) Interest and Accretions

499. General principles.

Where an account of legacies¹ is directed by any judgment then, subject to any directions contained in the codicil or will in question and to any order made by the court, interest is to be allowed on each legacy at 6 per cent per annum beginning at the expiration of one year from the testator's death², even if expressly made payable out of a particular fund which does not fall in until after a longer period³.

A true residuary legacy comprises all that is left after the prior gifts have been satisfied, so no question of interest on such a gift can arise, but if a testator expressly defers the date for payment of a residuary gift the surplus income arising during the period of postponement may be undisposed of and pass on intestacy⁴. Accordingly, the legatee's right to interest on a non-residuary legacy arises as a matter of administration to prevent the injustice of the residuary legatees receiving something which otherwise they could not have, merely because there has been a delay in distribution. The interest is not therefore a part of the legacy itself and must not be so regarded in determining questions of abatement⁵.

1 As to the liability to account see PARA 801 et seq post. As to the remedy of account generally see EQUITY vol 16(2) (Reissue) PARA 449.

2 CPR Sch 1 RSC Ord 44 r 10. As to the CPR see PARA 37 note 3 ante. There is a wide discretion to award interest on debts or damages in respect of any sum for which judgment is given or payment is made before judgment: see the Supreme Court Act 1981 s 35A (as added); the County Courts Act 1984 s 69 (as amended); and COURTS. Older decisions as to the permitted rate of interest vary: see *Re Burley, Tatham v Welch* [1917] WN 115; *Re Brinton, Brinton v Preen* [1923] WN 195 (interest at 5% on the specific legacies allowed on realisation of the residuary estate); *Re Hall, Barclays Bank Ltd v Hall* [1951] 1 All ER 1073, [1951] TLR 850 (interest at 4% on a general legacy of shares in a company where dividends accrued during the period between the expiration of a year after the testator's death and the satisfaction of the legacy). It has been held that interest is not allowed at a higher rate (except in the cases set out in PARA 497 ante) even though the residuary estate has been producing interest at a higher rate: *Re Campbell, Campbell v Campbell* [1893] 3 Ch 468; *Sitwell v Bernard* (1801) 6 Ves 520. It is submitted that the interest rate provided by CPR Sch 1 RSC Ord 44 r 10 should be followed in administering estates out of court though it appears that this could be challenged when it does not represent a 'fair equivalent': *Wentworth v Wentworth* [1900] AC 163 at 171, PC. 'In these days of huge and constantly changing interest rates ... I think it would be unrealistic for a court of equity to abide by the modest rate of interest which was current in the stable times of our forefathers' (discussing the rate at which interest should be awarded on compensation for a breach of trust): *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 at 547, [1980] 2 All ER 92 at 97-98 per Brightman LJ.

3 *Re Lord's Estate, Lord v Lord*(1867) 2 Ch App 782 at 789 per Lord Cairns LJ; *Re Whiteley, Whiteley v Bishop of London* (1909) 26 TLR 16, CA; *Re Yates, Throckmorton v Pike* (1907) 96 LT 758, CA; *Walford v Walford*[1912] AC 658, HL. As to interest on contingent legacies to minors for maintenance by parents or persons in loco parentis see PARA 497 text and note 4 ante.

4 *Re Oliver, Watkins v Fitton*[1947] 2 All ER 162, 177 LT 308; *Re Gillett's Will Trusts, Barclays Bank Ltd v Gillett*[1950] Ch 102, [1949] 2 All ER 893; *Re Geering, Gulliver v Geering*[1964] Ch 136, [1962] 3 All ER 1043. As to the residuary estate see PARA 531 et seq post.

5 *Re Wyles, Foster v Wyles*[1938] Ch 313, [1938] 1 All ER 347. As to abatement see PARA 506 et seq post.

UPDATE

499 General principles

TEXT AND NOTE 2--CPR Sch 1 RSC Ord 44 r 10 revoked: SI 2002/2058.

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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500. Date from which interest payable.

An immediate general legacy¹ carries interest only from the expiration of a year after the testator's death², even though it is directed to be paid as soon as possible³, and even though it is in favour of the testator's adult child⁴ or of the testator's wife⁵ or of trustees contingently for a child of the testator who is a minor⁶. A legacy made payable out of the proceeds of sale of real estate also carries interest only from the expiration of a year after the testator's death⁷.

A legacy given to a minor as executor does not carry interest until he attains his majority and agrees to act⁸.

Interest will be payable as from the date of death where it is directed by the will to be paid immediately after the testator's death⁹, where it amounts to satisfaction of a debt¹⁰ and where the legacy is charged on land and no time is fixed for payment¹¹.

1 As to general legacies see PARA 473 ante.

2 *Wood v Penoyre* (1807) 13 Ves 325 at 333-334; *Re Palfreeman, Public Trustee v Palfreeman* [1914] 1 Ch 877.

3 *Webster v Hale* (1803) 8 Ves 410 at 413; *Benson v Maude* (1821) 6 Madd 15.

4 *Wall v Wall* (1847) 15 Sim 513. See also *Raven v Waite* (1818) 1 Swan 553.

5 *Stent v Robinson* (1806) 12 Ves 461, disagreeing with the dictum of Arden MR in *Crickett v Dolby* (1795) 3 Ves 10 at 17; *Re Whittaker, Whittaker v Whittaker* (1882) 21 ChD 657.

6 *Re Pollock, Pugsley v Pollock* [1943] Ch 338, [1943] 2 All ER 443. As to legacies to minors see PARA 493 et seq ante.

7 *Turner v Buck* (1874) LR 18 Eq 301.

8 *Re Gardner, Long v Gardner* (1892) 41 WR 203.

9 *Re Riddell, Public Trustee v Riddell* [1936] Ch 747, [1936] 2 All ER 1600; *Re Pollock, Pugsley v Pollock* [1943] Ch 338, [1943] 2 All ER 443.

10 *Clark v Sewell* (1744) 3 Atk 96 at 99. As to satisfaction of debts by legacy see EQUITY vol 16(2) (Reissue) PARAS 751-753.

11 *Pearson v Pearson* (1802) 1 Sch & Lef 10; *Shirt v Westby* (1808) 16 Ves 393. See also *Re Waters, Waters v Boxer* (1889) 42 ChD 517.

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501. Legacies payable at a future date.

Legacies payable at a future date carry interest from that date¹ and not before². Where they are made payable within a particular period they carry interest from the end of the year, if the discretion to postpone payment is merely for the convenience of the estate, and there are sufficient assets within the period to pay them³; but not until the expiration of the period specified if the discretion to postpone is given for the residuary legatee's personal benefit⁴.

The interest on a vested legacy liable to be divested on the happening or non-happening of a particular event belongs to the legatee and carries interest until the happening of the defeasance⁵, but, in the absence of testamentary direction, a future vested legacy liable to be divested does not carry the intermediate income⁶.

No action to recover arrears of interest in respect of a legacy may normally be brought after six years from the date when the interest became due⁷.

1 *Re Gyles, Gibbon v Chaytor* [1907] 1 IR 65; *Re White, White v Shenton* (1909) 101 LT 780.

2 *Donovan v Needham* (1846) 9 Beav 164; *Re McGeorge, Ratcliff v McGeorge* [1963] Ch 544, [1963] 1 All ER 519, distinguishing *Bickersteth v Shanu* [1936] AC 290, [1936] 1 All ER 227, PC.

3 *Thomas v A-G* (1837) 2 Y & C Ex 525.

4 *Varley v Winn* (1856) 2 K & J 700; *Re Olive, Olive v Westerman* (1884) 53 LJ Ch 525.

5 *Re Buckley's Trusts* (1883) 22 ChD 583. As to conditional gifts see WILLS vol 50 (2005 Reissue) PARA 419 et seq.

6 *Re Gillett's Will Trusts, Barclays Bank Ltd v Gillett* [1950] Ch 102, [1949] 2 All ER 893. As to those legacies which carry the intermediate income see PARA 502 post.

7 See the Limitation Act 1980 s 22; and LIMITATION PERIODS vol 68 (2008) PARA 1161.

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502. Contingent legacies.

A contingent or future specific devise or bequest¹ of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory, subject to the statutory provisions relating to accumulations², carry the intermediate income of that property from the testator's death, except so far as that income or any part of it may be otherwise expressly disposed of³. A contingent general legacy does not, as a rule, carry interest until the happening of the contingency. Where, however, a contingent general legacy is directed to be severed from the rest of the estate for the benefit of the legatee it carries the intermediate income⁴, but not where the severance is directed merely for the convenience of administering the estate⁵. A contingent gift of residuary personalty, or of a blended fund of real and personal estate, carries the intermediate income⁶ even if the donee is not yet in being⁷.

The above rules apply in respect of wills coming into operation after 1925⁸. A contingent specific legacy⁹ and a contingent gift of residuary realty¹⁰ under a will which came into operation before 1926 does not carry with it the intermediate income unless it has been directed to be set apart¹¹.

1 See note 3 infra.

2 As to accumulations see the Law of Property Act 1925 ss 164-166; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 119 et seq.

3 Law of Property Act 1925 s 175(1). A pecuniary legacy to a minor upon attaining his majority is not a specific bequest within the meaning of this provision so as to carry the intermediate income, and the intermediate income cannot be applied for his maintenance except in a case falling within the principles stated in PARA 497 ante, since the statutory powers (see PARA 498 note 10 ante) relating to the maintenance of minors apply in general in the case of a contingent interest only if it carries the intermediate income: see the Trustee Act 1925 s 31(3); CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 66; and *Re Raine, Tyerman v Stanfield* [1929] 1 Ch 716. Where this provision does apply it may be necessary to accumulate intermediate income until the person ultimately entitled can be ascertained: see *Re McGeorge, Ratcliffe v McGeorge* [1963] Ch 544, [1963] 1 All ER 519. For the meaning of 'property' see REAL PROPERTY vol 39(2) (Reissue) PARA 1; for the meaning of 'land' see REAL PROPERTY vol 39(2) (Reissue) PARA 77; and for the meaning of 'income' see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 865.

4 *Dundas v Wolfe Murray* (1863) 1 Hem & M 425; *Kidman v Kidman* (1871) 40 LJ Ch 359; *Re Medlock, Ruffle v Medlock* (1886) 55 LJ Ch 738; *Re Inman, Inman v Rolls* [1893] 3 Ch 518; *Re Clements, Clements v Pearsall* [1894] 1 Ch 665; *Re Woodin, Woodin v Glass* [1895] 2 Ch 309, CA.

5 *Re Judkin's Trusts* (1884) 25 ChD 743.

6 *Green v Ekins* (1742) 2 Atk 473; *Genery v Fitzgerald* (1822) Jac 468; *Re Dumble, Williams v Murrell* (1883) 23 ChD 360; *Re Burton's Will, Banks v Heaven* [1892] 2 Ch 38; *Re Taylor, Smart v Taylor* [1901] 2 Ch 134. See also *Re Mellor, Alvarez v Dodgson* [1922] 1 Ch 312, CA.

7 *Bective v Hodgson* (1864) 10 HL Cas 656.

8 Law of Property Act 1925 s 175(2). As to the payment of interest, apart from statute, on a contingent legacy to a minor by his parent see PARA 497 ante.

9 *Guthrie v Walrond* (1883) 22 ChD 573; *Re Eyre, Johnson v Williams* [1917] 1 Ch 351. For an exception in the case of a minor see PARA 498 ante.

10 *Hodgson v Earl Bective* (1863) 1 Hem & M 376; affd sub nom *Bective v Hodgson* (1864) 10 HL Cas 656.

11 *Re Woodin, Woodin v Glass* [1895] 2 Ch 309, CA.

503. Arrears of annuities.

Arrears of annuities do not carry interest¹, even though the annuity is intended as a provision for a wife or child², or is charged on corpus as well as on income³.

1 *Re Hiscoe, Hiscoe v Waite* (1902) 71 LJ Ch 347. As to annuities see RENTCHARGES AND ANNUITIES.

2 *Torre v Browne* (1855) 5 HL Cas 555 at 577; *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744 at 761, [1968] 3 All ER 364 at 374, CA, per Harman LJ.

3 *Wheatly v Davies* (1876) 35 LT 306.

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504. Dividends and rents.

All accretions from the date of death are carried with a specific legacy¹, whether immediate² or contingent³.

Where there is a general legacy⁴ of shares in a company the legatees are not entitled to dividends which accrue during the period between the expiration of a year after the testator's death and the satisfaction of the legacies; they are entitled only to interest for that period⁵.

The dividends on a specific legacy⁶, the rents on a specific devise⁷ and the income of residue in a case where the beneficiary is entitled to the whole income from the testator's death⁸ must be apportioned⁹, as between the testator's estate and the beneficiary, up to the date of the testator's death unless there is an express direction to the contrary¹⁰.

1 As to specific legacies see PARA 472 ante.

2 *Sleech v Thorington* (1754) 2 Ves Sen 560 at 563; *Re Jeffery's Trusts* (1866) LR 2 Eq 68; *Re Marten, Shaw v Marten* [1901] 1 Ch 370; and see *Re Jacob, M'Coy v Jacob* [1919] 1 IR 134.

3 *Re Buxton, Buxton v Buxton* [1930] 1 Ch 648.

4 As to general legacies see PARA 473 ante.

5 *Re Hall, Barclays Bank Ltd v Hall* [1951] 1 All ER 1073, [1951] 1 TLR 850. As to the rate of interest see PARA 499 ante.

6 *Pollock v Pollock* (1874) LR 18 Eq 329.

7 *Hasluck v Pedley* (1874) LR 19 Eq 271; *Constable v Constable* (1879) 11 ChD 681.

8 He is entitled under the Apportionment Act 1870 s 2 (as amended): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 278; RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 839; SETTLEMENTS vol 42 (Reissue) PARAS 957-958.

9 *Re Bate, Public Trustee v Bate* [1938] 4 All ER 218, a case where the rule in *Howe v Earl of Dartmouth* (see PARA 540 post) was excluded.

10 See the Apportionment Act 1870 s 7; and *Re Bate, Public Trustee v Bate* [1938] 4 All ER 218.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vi) Interest and Accretions/505. Appropriation of payments to principal or interest.

505. Appropriation of payments to principal or interest.

Subject to any direction in the will or order of the court to the contrary, where a legacy cannot be satisfied when due, a payment is made on account of principal and interest of a legacy and the legatee may appropriate the payment first to interest and then to principal¹.

¹ *Re Prince, Hardman v Willis* (1935) 51 TLR 526; *Thomas v Montgomery* (1830) 1 Russ & M 729; *Re Morley's Estate* [1937] Ch 491, [1937] 3 All ER 204. As to the deduction of income tax from such payments where attributable to interest see INCOME TAXATION.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vii) Abatement of Legacies and Annuities/506. Abatement of general legacies.

(vii) Abatement of Legacies and Annuities

506. Abatement of general legacies.

If an estate is insufficient to pay all the legacies in full, the general legacies¹ (which in this context include annuities²) must, in the absence of a contrary direction by the testator³, abate in equal proportions⁴. The onus of proving that his legacy was intended by the testator to be paid in priority lies on the party seeking priority, and the proof must be clear and conclusive⁵ on the language of the will. Near relationship to the testator does not of itself give a legatee priority over other legatees⁶. A mere direction to pay a legacy immediately, or within one month, or within three months after a testator's death, is no evidence of any intention on the testator's part to give priority to that particular legacy in case of a deficiency in the estate⁷. A legacy given to a testator's widow to be paid immediately after his death for her immediate wants is liable to abatement with the other legacies⁸. A legacy to an executor is not entitled to any priority⁹. Where a legacy was given free of the former legacy duty, that duty had to be treated as an additional legacy and be added to the legacy for the purpose of abatement¹⁰.

¹ As to general legacies see PARA 473 ante. The reference to legacies in the text includes those contained in, or substituted by, a codicil: *Re MacCarthy, National Bank Ltd v Archbishop of Dublin*[1958] IR 311.

² As to annuities see generally RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

³ *Marsh v Evans* (1720) 1 P Wms 668; *Lewin v Lewin* (1752) 2 Ves Sen 415.

⁴ 2 Bl Com (14th Edn) 512. See also *Re Whitehead, Whitehead v Street*[1913] 2 Ch 56; *Re Bosanquet, Unwin v Petre* (1915) 85 LJ Ch 14; *Re Daniels, London City and Midland Executor and Trustee Co Ltd v Daniels* (1918) 87 LJ Ch 661.

⁵ *Miller v Huddleston* (1851) 3 Mac & G 513 at 523 per Lord Truro LC. As to priority of payment of legacies see *Re Harris, Harris v Harris*[1912] 2 Ch 241; *Thwaites v Foreman* (1844) 1 Coll 409 at 414 (on appeal (1846) 15 LJ Ch 397); *Re Leach, Milne v Daubeny*[1923] 1 Ch 161.

6 *Re Schweder's Estate, Oppenheim v Schweder*[1891] 3 Ch 44. Where before 1926 a legacy was bequeathed to the testator's widow in satisfaction of her right to dower she was regarded as a purchaser of the legacy, and if she elected to take it in lieu of dower the legacy had priority over other legacies, notwithstanding that it might greatly exceed the amount of the dower (*Burridge v Brady* (1710) 1 P Wms 127; *Blower v Morret* (1752) 2 Ves Sen 420; *Davenhill v Fletcher* (1754) Amb 244; *Heath v Dendy* (1826) 1 Russ 543; *Roper v Roper*(1876) 3 ChD 714 at 719). The widow was not entitled to priority where the testator left no real estate to which the right to dower could attach, or where he had barred her right to dower by any mode in which dower could be barred, including a disposition of his real estate by will (*Re Greenwood, Greenwood v Greenwood*[1892] 2 Ch 295; *Re Whitehead, Whitehead v Street*[1913] 2 Ch 56). As to dower see REAL PROPERTY vol 39(2) (Reissue) PARA 161.

7 *Re Schweder's Estate, Oppenheim v Schweder*[1891] 3 Ch 44 at 45 per Chitty J, following *Blower v Morret* (1752) 2 Ves Sen 420, and dissenting from *Re Hardy, Wells v Borwick*(1881) 17 ChD 798. See also *Brown v Allen* (1681) 1 Vern 31; *Beeston v Booth* (1819) 4 Madd 161.

8 *Cazenove v Cazenove* (1889) 61 LT 115.

9 *Duncan v Watts* (1852) 16 Beav 204; *O'Higgins v Walsh*[1918] 1 IR 126; *Re Brown, Wace v Smith* (1918) 62 Sol Jo 487; *Re Leach, Milne v Daubeny*[1923] 1 Ch 161.

10 *Re Turnbull, Skipper v Wade*[1905] 1 Ch 726; *Re Leach, Milne v Daubeny*[1923] 1 Ch 161. As to the abolition of legacy duty see PARA 552 post; and INHERITANCE TAXATION vol 24 (Reissue) PARA 401.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vii) Abatement of Legacies and Annuities/507. Demonstrative legacies and specific legacies.

507. Demonstrative legacies and specific legacies.

Demonstrative legacies¹ do not abate with general legacies² except so far as the fund provided is insufficient for their payment³. When the fund provided is exhausted demonstrative legacies abate proportionately with the other general legacies⁴.

Specific legacies⁵ do not abate with general legacies, but where the general estate is insufficient to pay all the debts, they must abate rateably among themselves⁶. The rule applies to a gift of a specific fund in aliquot proportions⁷, but where fixed sums are given out of a particular fund and the balance is disposed of as residue, and not as an aliquot proportion, the residue must first be exhausted⁸.

1 As to demonstrative legacies see PARA 474 ante.

2 As to general legacies see PARA 473 ante.

3 *Roberts v Pocock* (1798) 4 Ves 150 at 160; *Mann v Copland* (1817) 2 Madd 223; *Fowler v Willoughby* (1825) 2 Sim & St 354; *Mullins v Smith* (1860) 1 Drew & Sm 204.

4 *Paget v Huish* (1863) 1 Hem & M 663; *Mullins v Smith* (1860) 1 Drew & Sm 204 at 210.

5 As to specific legacies see PARA 472 ante.

6 *Brown v Allen* (1681) 1 Vern 31; *Duke of Devon v Atkins* (1726) 2 P Wms 381. See also *Re Compton, Vaughan v Smith* [1914] 2 Ch 119; *Re Cohen, National Provincial Bank Ltd v Katz* [1960] Ch 179, [1959] 3 All ER 740. See also the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II; and PARA 416 et seq ante.

7 *Page v Leapingwell* (1812) 18 Ves 463.

8 *Petre v Petre* (1851) 14 Beav 197. See also *De Lisle v Hodges* (1874) LR 17 Eq 440; *Re Tunno, Raikes v Raikes* (1890) 45 ChD 66.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vii) Abatement of Legacies and Annuities/508. Legacy in satisfaction of debt.

508. Legacy in satisfaction of debt.

There appears to be some doubt whether a legacy given in satisfaction of a debt abates with legacies given to volunteers¹. In a case where the debt was an ascertained debt and the legatee had elected to take under the will a legacy far in excess of his debt, it was held that his legacy must abate rateably with the other pecuniary legacies², but there are statements to be found that legacies to creditors are not liable to abatement with legacies to volunteers³. A creditor with whom the testator has compounded cannot be treated as a purchaser of his legacy⁴.

1 As to legacies given in satisfaction of debt see EQUITY vol 16(2) (Reissue) PARAS 751-753.

2 *Re Wedmore, Wedmore v Wedmore* [1907] 2 Ch 277; *Re Whitehead, Whitehead v Street* [1913] 2 Ch 56 (legacy conditional on release under settlement).

3 See *Davies v Bush* (1831) You 341 at 343 per Lord Lyndhurst LCB; *Re Lawley, Zaiser v Lawley* [1902] 2 Ch 799 at 807, CA, per Cozens-Hardy LJ; on appeal sub nom *Beyfus v Lawley* [1903] AC 411, HL.

4 *Coppin v Coppin* (1725) 2 P Wms 291 at 296. As to compositions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 863.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vii) Abatement of Legacies and Annuities/509. Abatement of annuities.

509. Abatement of annuities.

Where annuities¹ are given by will and abatement is necessary in accordance with the rules², the annuities must be valued and abated proportionately and (subject to what is stated below) the abated sum must be paid to the annuitant³ or to his personal representatives if he has died after the sum has been ascertained⁴. The sums paid in respect of annuities abated in this way are capital sums and are not taxable for income tax purposes⁵.

This rule of administration yields to a contrary intention expressed by the testator, and it is accordingly necessary first to ascertain from the will whether the testator has in fact provided for the deficiency which has occurred⁶. Moreover, cases may occur where, although the annual income is insufficient to provide for the annuities, it is apparent, having regard to the age of the annuitants and other circumstances, that the capital and income together must be amply sufficient to satisfy the annuities in full. In those circumstances it may work great hardship on the residuary legatee if capital sums are paid to the annuitants. Accordingly in cases of this kind the annuitants are not entitled to demand capital sums in lieu of their annuities⁷.

1 As to annuities see generally RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

2 As to these rules see PARAS 506-507 ante.

3 *Long v Hughes* (1831) 1 De G & Sm 364; *Wright v Callender* (1852) 2 De GM & G 652; *Wroughton v Colquhoun* (1847) 1 De G & Sm 357; *Innes v Mitchell* (1847) 2 Ph 346; *Re Cottrell, Buckland v Bedingfield* [1910] 1 Ch 402; *Re Richardson, Richardson v Richardson* [1915] 1 Ch 353; *Re Dempster, Borthwick v Lovell* [1915] 1 Ch 795; *Miller v Huddleston* (1851) 3 Mac & G 513; *Daniell v Daniell* (1849) 3 De G & Sm 337 at 342.

4 See *Re Ross, Ashton v Ross* [1900] 1 Ch 162.

5 *IRC v Lady Castlemaine* [1943] 2 All ER 471. This principle extends to payments made as income payments before the deficiency is discovered: see INCOME TAXATION vol 23(1) (Reissue) PARA 478. If annuities were given free of legacy duty, the duty was treated as an additional legacy for the purposes of valuation: *Re Turnbull, Skipper v Wade* [1905] 1 Ch 726. As to the abolition of legacy duty see PARA 552 post; and INHERITANCE TAXATION vol 24 (Reissue) PARA 401. As to the valuation of annuities for the purposes of inheritance tax see INHERITANCE TAXATION vol 24 (Reissue) PARA 625.

6 *Re De Chassiron, Lloyds Bank Ltd v Sharpe* [1939] Ch 934, [1939] 3 All ER 321.

7 *Re Hill, Westminster Bank v Wilson* [1944] Ch 270, [1944] 1 All ER 502, CA. These principles can be applied by the personal representatives in the course of administration without a court order: *Re Brouncker, Mairis v Mandeville* [1938] WN 147; *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35, [1942] 2 All ER 629.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vii) Abatement of Legacies and Annuities/510. Defeasible annuities.

510. Defeasible annuities.

Where the annuity¹ is defeasible upon the happening of an event in the lifetime of the annuitant he is not entitled to have the capital sum paid over to him, but that sum should be applied in the purchase of an annuity, and the annuity so purchased should be paid to the annuitant until the event occurs or the annuitant dies².

1 As to annuities see generally RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

2 *Carr v Ingleby* (1831) 1 De G & Sm 362; *Gratrix v Chambers* (1860) 2 Giff 321; *Re Richardson, Mahony v Treacy* [1915] 1 IR 39; *Re Dempster, Borthwick v Lovell* [1915] 1 Ch 795. If, however, the annuity is payable by virtue of a covenant entered into by the testator during his life and not by virtue of a gift in his will, and, his estate being insufficient to pay the annuity in full, the annuity has been valued in an administration action and is represented by a fund in court, the fund must be paid to the annuitant: *Re Sinclair, Allen v Sinclair, Hodgkins v Sinclair* [1897] 1 Ch 921, distinguished in *Re Dempster, Borthwick v Lovell* supra at 800.

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511. Conflicting interest.

Complications occur where a fund is directed to be appropriated to answer an annuity¹ and there is a gift over of the appropriated fund after the annuitant's death. In such a case the contest is not merely between those interested in the fund on the one hand and the other legatees on the other hand but also between those interested in the fund among themselves.

In cases of this kind it is a matter of construction whether the annuitant or those entitled under the gift over is or are entitled to priority. If the rights of the annuitant are paramount, the capital value of the annuity, abated if necessary, is paid to the annuitant². If the rights of those entitled under the gift over are paramount, a sum is ascertained and invested in a manner which will, with all reasonable certainty, produce the annuity, and the annuitant is entitled to the income produced by this sum, abated if necessary³. Finally, a third method may be adopted by which the capital value of the annuity, abated if necessary, is ascertained, and the annuitant is paid the full amount of his annuity, resort being had to the capital of the fund, until the fund is exhausted. Any surplus left when the annuitant dies is paid to those entitled under the gift over⁴.

1 As to annuities see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

2 *Re Farmer, Nightingale v Whybrow* [1939] Ch 573, [1939] 1 All ER 319; *Re Wilson* [1940] Ch 966, [1940] 4 All ER 57.

3 *Re Carew, Channer v Franklyn* [1939] Ch 794, [1939] 3 All ER 200.

4 *Re Nicholson, Chadwyck-Healey v Crawford* [1938] 3 All ER 270; *Re Thomas, Public Trustee v Falconer* [1946] Ch 36, [1945] 2 All ER 586.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vii) Abatement of Legacies and Annuities/512. Valuation of annuities.

512. Valuation of annuities.

The valuation of annuities¹ is a matter in which it is desirable that there should be a uniform practice although alternative methods may be resorted to when the circumstances are unusual². The valuation should be on a strict actuarial basis, and facts, such as the health of the annuitant or the risks attendant to his vocation, must be disregarded³. When the valuation is made by the court, every relevant fact known at the date of the hearing will be taken into account⁴. Therefore, if an annuitant has died since the testator, the value of his annuity is taken to be the actual amount of the arrears to which he was entitled up to the date of his death according to the tenor of the will⁵; and where a considerable period has elapsed since the testator's death, and the annuitant is still living, the proper method of valuation is to calculate the capital value of the annuity at the time of the valuation and add the arrears to the sum so ascertained⁶. In ordinary cases, however, where there has been no material change in the circumstances since the date of the testator's death, it is convenient and right to take that date as the date for any valuations which have to be made⁷.

When an annuity given free of income tax⁸ has to be valued, the rate of tax to be taken into account is the rate ruling at the date when the valuation has to be made⁹.

It is competent for the personal representatives themselves to make any necessary valuations without recourse to the court, but it is proper for them to seek the court's directions if they are uncertain about the course they ought to pursue¹⁰.

Annuitants in possession are not bound, as between themselves and reversionary annuitants, to bring past payments into hotchpot¹¹.

1 As to annuities see generally RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq. As to the valuation of annuities for inheritance tax purposes see INHERITANCE TAXATION vol 24 (Reissue) PARA 625.

2 *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 40, [1942] 2 All ER 629 at 633 per Uthwatt J; *Re McEuen, McEuen v Phelps* [1913] 2 Ch 704, CA.

3 *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 40, [1942] 2 All ER 629 at 634 per Uthwatt J; *Ex p Thistlewood* (1812) 19 Ves 236.

4 *Potts v Smith* (1869) LR 8 Eq 683 at 686 per James V-C; *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] 1 Ch 35, [1942] 2 All ER 629.

5 *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35, [1942] 2 All ER 629; *Todd v Bielby* (1850) 27 Beav 353; *Re Ellis, Nettleton v Crimmins* [1935] Ch 193; *Re Ball, Lucas v Ball* [1940] 4 All ER 245; *Re Cox, Public Trustee v Eve* [1938] Ch 556, [1937] 1 All ER 661; *Re Twiss* [1941] Ch 141, [1941] 1 All ER 93.

6 *Heath v Nugent* (1860) 29 Beav 226; *Re Wilkins, Wilkins v Rotherham* (1884) 27 ChD 703; *Delves v Newington* (1885) 52 LT 512; *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 46, [1942] 2 All ER 629 at 636 per Uthwatt J.

7 *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 46, [1942] 2 All ER 629 at 636 per Uthwatt J.

8 As to income tax see INCOME TAXATION.

9 *Re Ball, Lucas v Ball* [1940] 4 All ER 245; *Re Twiss* [1941] Ch 141, [1941] 1 All ER 93; *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* [1945] Ch 72, [1944] 2 All ER 593.

10 *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 39, [1942] 2 All ER 629 at 631 per Uthwatt J; *Re Brouncker, Mairis v Mandeville* [1938] WN 147.

11 *Re Metcalf, Metcalf v Blencowe* [1903] 2 Ch 424. The direction to the contrary appearing in the order in *Potts v Smith* (1869) LR 8 Eq 683 is inconsistent with the judgment in that case: *Re Metcalf, Metcalf v Blencowe* supra at 428 per Farwell J. As to hotchpot see PARA 616 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(vii) Abatement of Legacies and Annuities/513. Valuation of reversionary annuities.

513. Valuation of reversionary annuities.

Where a testator bequeaths a reversionary annuity¹ and also immediate pecuniary legacies, and his estate is ascertained at his death to be insufficient, the court values the annuity on the basis of its being a reversionary interest, and this valuation abates rateably with the immediate legacies². Again, where in the case of a bequest of a reversionary annuity the estate is only ascertained at some point of time after the testator's death to be insufficient, and before that point of time the reversionary annuity has fallen into possession, the value of the reversionary annuity must be ascertained by adding the amount of the arrears accrued since the annuity fell into possession to the then present value of the future payments³.

Where a testator bequeaths two annuities, one immediate and the other reversionary, and the immediate annuity is for some time paid in full, but the estate is subsequently found to be insufficient, and that annuity remains for some time unpaid, then, in the division between the immediate and reversionary annuitants of the funds ultimately available, the immediate annuitant is not bound to bring into hotchpot his early payments in full⁴.

1 As to annuities see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

2 *Re Metcalf, Metcalf v Blencowe* [1903] 2 Ch 424 at 428; *Innes v Mitchell* (1846) 1 Ph 710 at 716.

3 *Potts v Smith* (1869) LR 8 Eq 683 at 687. If the reversionary interest has not fallen into possession at the time when the estate is ascertained to be insufficient, it would seem that the annuity should be valued as at that time on the basis of its being a reversionary interest, but this rule is not settled.

4 *Re Metcalf, Metcalf v Blencowe* [1903] 2 Ch 424. As to hotchpot see PARA 616 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/514. Right to follow assets.

(viii) Refunding

514. Right to follow assets.

The principle that trust property may be followed¹, the effect of a mixing of trust funds with other funds², the limitation period applicable to proceedings to recover assets from persons who have been wrongly paid or overpaid³, and the classes of persons who are entitled to exercise the right and call for a refund⁴ are considered elsewhere in this work.

1 See EQUITY vol 16(2) (Reissue) PARA 861.

2 See EQUITY vol 16(2) (Reissue) PARA 863.

3 See EQUITY vol 16(2) (Reissue) PARA 866.

4 See EQUITY vol 16(2) (Reissue) PARA 866.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/515. Refunding between executor and legatee.

515. Refunding between executor and legatee.

The voluntary payment in full of a legacy by an executor amounts to an admission by him of assets sufficient for all, so he will be compelled if solvent to pay all other legacies in full whatever the state of the assets¹. If he is insolvent or the remedies against him have been exhausted², the unpaid or under paid legatee may have recourse to a claim for the sum due, normally without interest³, against the wrongly paid or overpaid legatee⁴, unless the deficiency has arisen since the date of payment by reason of acts of waste by the executor or otherwise⁵. An executor-trustee who has severed a portion of the estate in favour of a particular legatee is not entitled to have recourse to the severed portion to indemnify himself against a liability which he has been called upon to discharge in respect of another portion of the estate⁶.

Where the executor has parted with the residue to the residuary legatee under a mistake he can call on that legatee to refund whether the payment is made under a mistake of fact⁷ or under a mistake of law⁸. The executor's right to recover, at least in the latter case, is subject to the defences available in the law of restitution⁹. The question whether an executor can recover interest from an overpaid legatee or whether he must restrict himself to recovering the capital paid to the legatee without interest is open to doubt¹⁰.

1 *Orr v Kaines* (1750) 2 Ves Sen 194; approved in *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 487-488, [1948] 2 All ER 318 at 329, CA, per Lord Greene MR; on appeal sub nom *Ministry of Health v Simpson* [1951] AC 251 at 267, [1950] 2 All ER 1137 at 1141-1142, HL, per Lord Simonds. As to the admission of assets see PARA 836 et seq post.

2 *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. See also EQUITY vol 16(2) (Reissue) PARA 861 et seq. As to the position where the personal representative has distributed the estate under the protection of a court order or statute see PARA 524 post.

3 Interest may, however, sometimes be payable: see EQUITY vol 16(2) (Reissue) PARA 866.

4 See PARA 516 post.

5 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 487-488, [1948] 2 All ER 318 at 329, CA, per Lord Greene MR (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL); *Anon* (1718) 1 P Wms 495; *Walcott v Hall* (1788) 2 Bro CC 305; *Fenwick v Clarke* (1862) 4 De GF & J 240.

6 *Fraser v Murdoch* (1881) 6 App Cas 855, HL; *Re Craven, Watson v Craven* [1914] 1 Ch 358.

7 Eg where he has parted with the residue without knowledge of anything that interferes with the right of the residuary legatee to receive it and debts are subsequently discovered which he is obliged to pay. Notice at the time of distribution of a mere liability which does not constitute a debt does not prevent him from subsequently calling upon the residuary legatee: see *Jervis v Wolferstan* (1874) LR 18 Eq 18; *Whittaker v Kershaw* (1890) 45 Ch D 320, CA.

8 The former rule precluding recovery of money paid under a mistake of law has been abolished: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL. Therefore, it is no longer safe to follow older decisions such as *Coppin v Coppin* (1725) 2 P Wms 291; *Orr v Kaines* (1750) 2 Ves Sen 194; *Bate v Hooper* (1855) 5 De GM & G 338; *Downes v Bullock* (1858) 25 Beav 54; *Jervis v Wolferstan* (1874) LR 18 Eq 18 at 25 per Jessel MR; *Re Bird, Evans, Dodd v Evans* [1901] 1 Ch 916; *Re Diplock, Diplock v Wintle* [1948] Ch 465.

9 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 372, [1998] 4 All ER 513 at 530, HL, per Lord Goff. The probable defences include, but may not be limited to change of position (*Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL), estoppel and compromise. See further RESTITUTION vol 40(1) (2007 Reissue) PARA 1 et seq.

10 The presently accepted rule is that, in recalling a payment to an overpaid legatee the court is not to demand interest (*Jervis v Wolferstan* (1874) LR 18 Eq 18 at 27) although, if the legatee is entitled to another fund making interest in the hands of the court, there ought to be a recoupment out of his share (*Gittins v Steele* (1818) 1 Swan 199). The position is now uncertain following the award of interest in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL.

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516. Right to equalise out of future payments.

An executor-trustee who has overpaid one beneficiary is entitled in the future administration of the trusts to equalise the payments at the expense of the overpaid beneficiary¹; and there is no general rule that he cannot claim such an adjustment in his own favour where he is the person responsible for the mistake which has been made².

1 *Livesey v Livesey* (1827) 3 Russ 287; *Dibbs v Goren* (1849) 11 Beav 483.

2 *Re Ainsworth, Finch v Smith* [1915] 2 Ch 96; *Re Reading, Edmonds v Reading* (1916) 60 Sol Jo 655. In special circumstances, however, an executor may be unable to claim an adjustment: *Re Horne, Wilson v Cox Sinclair* [1905] 1 Ch 76.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/517. Refunding between legatees.

517. Refunding between legatees.

Equity¹ will not allow one person to retain what is really and legally applicable to the payment of another². Accordingly, where a legacy has been wrongly paid or overpaid under a mistake of law or fact and without the approval of the other beneficiaries³, then, notwithstanding any contrary former practice of the ecclesiastical courts⁴, the court will compel the legatee to refund⁵, whether the person properly entitled is a creditor⁶ or another legatee⁷. The right of an underpaid legatee to claim directly against an overpaid legatee is, however, subject to the qualification that the underpaid legatee must first exhaust his remedy against the executor who has made the wrongful payment⁸. A residuary legatee who institutes administration proceedings can be compelled in those proceedings to refund, for the purpose of paying legacies, money paid to him by the executor before the claim⁹.

Where one of several residuary legatees has received his share of the estate the other cannot call upon him to refund if the estate is subsequently wasted, but they can do so if the wasting has taken place before the share was received¹⁰. It lies upon the person requiring the money to be refunded to show that the payment was made in excess¹¹.

1 Recourse may also be had to restitutionary remedies: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL. See also RESTITUTION vol 40(1) (2007 Reissue) PARA 1 et seq.

2 *Harrison v Kirk* [1904] AC 1 at 7, HL, per Lord Davey. As to refunding between creditors and legatees see PARA 519 post.

3 *Rogers v Ingham* (1876) 3 ChD 351, CA.

4 See *Ministry of Health v Simpson* [1951] AC 251 at 267, [1950] 2 All ER 1137 at 1141, HL, per Lord Simonds.

5 *Noel v Robinson* (1682) 1 Vern 90; *Nelthrop v Hill* (1669) 1 Cas in Ch 135; *Grove v Banson* (1669) 1 Cas in Ch 148; *Chamberlain v Chamberlain* (1675) 1 Cas in Ch 256; *Anon* (1683) 1 Vern 162; *Newman v Barton* (1690) 2 Vern 205; *Walcott v Hall* (1788) 2 Bro CC 305; *Peterson v Peterson* (1866) LR 3 Eq 111; *Re Rivers, Pullen v Rivers* [1920] 1 Ch 320.

6 *Harrison v Kirk* [1904] AC 1, HL.

7 *David v Frowd* (1833) 1 My & K 200.

8 See PARA 515 ante; and EQUITY vol 16(2) (Reissue) PARA 865.

9 *Prowse v Spurgin* (1868) LR 5 Eq 99.

10 *Peterson v Peterson* (1866) LR 3 Eq 111; *Re Winslow, Frere v Winslow* (1890) 45 ChD 249. See also EQUITY vol 16(2) (Reissue) PARA 866. In *Re Rivers, Pullen v Rivers* [1920] 1 Ch 320, where residuary legatees had been paid but a sum set aside in administration proceedings to pay an annuity proved insufficient to pay the legacy left to the annuitant's children after the death, it was held that the residuary legatees were liable to refund the amount of the deficiency to the children.

11 *Peterson v Peterson* (1866) LR 3 Eq 111 at 114.

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THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/518.
Refunding on intestacy.

518. Refunding on intestacy.

Where an intestate's estate has been distributed among the presumed next of kin¹, and another person subsequently establishes his title to be next of kin, he can compel the persons among whom the estate has been distributed to refund what has been paid to them in excess of their shares².

If the estate of a testator has been distributed on the footing that an invalid residuary disposition was valid, then, subject to the qualification that they have first exhausted their remedies against the executors³, the next of kin may claim directly against the persons to whom the residuary estate has been wrongly distributed⁴.

1 As to distribution of an intestate's estate see PARAS 555-558 post.

2 *David v Frowd* (1833) 1 My & K 200; *Sawyer v Birchmore* (1837) 2 My & Cr 611. The question whether the distribution was in pursuance of a court order is immaterial, except that where distribution was in pursuance of an order, an unpaid creditor is not required to bring a further action against the personal representative before proceeding against the persons wrongfully paid: *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 489-490, [1948] 2 All ER 318 at 330, CA, per Lord Greene MR; on appeal sub nom *Ministry of Health v Simpson* [1951] AC 251 at 268, [1950] 2 All ER 1137 at 1142, HL, per Lord Simonds. See also see PARA 524 post.

3 See PARAS 515-517 ante.

4 *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

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THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/519.
Refunding between creditor and legatees.

519. Refunding between creditor and legatees.

A creditor has no legal right to recover payment of his debt against a legatee, but, in order to do justice and to avoid the evil of allowing one person to retain what is really and legally applicable to the payment of another, the court has devised a remedy by which, where the estate has been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or to the next of kin¹. The creditor's right being, however, purely equitable, it may be met by any answer which affords a good equitable defence², such as laches, acquiescence or other conduct which would render it unjust for the court to allow him to assert any right against the legatee³.

1 *Harrison v Kirk* [1904] AC 1 at 7, HL, per Lord Davey; *Noel v Robinson* (1681) 1 Vern 90 at 94; *March v Russell* (1837) 3 My & Cr 31; *National Assurance Co v Scott* [1909] 1 IR 325. As to the extent to which it is material whether the distribution was in court or out of court see PARA 518 note 2 ante.

2 *Harrison v Kirk* [1904] AC 1 at 7, HL; *March v Russell* (1837) 3 My & Cr 31; *National Assurance Co v Scott* [1909] 1 IR 325; *Blake v Gale* (1886) 32 ChD 571, CA.

3 *Ridgway v Newstead* (1860) 2 Giff 492 at 501 per Stuart V-C; on appeal (1861) 3 De GF & J 474. See also *Re Eustace, Lee v McMillan* [1912] 1 Ch 561, where delay did not amount to laches. As to equitable defences generally see EQUITY vol 16(2) (Reissue) PARA 901 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/520. Creditor's right against fund in court.

520. Creditor's right against fund in court.

Where the estate is being administered by the court the creditor can at any time, upon such terms as the court may think fit to impose, come in and claim against a fund in court standing to the general credit of the administration proceedings¹.

As against a fund which has been carried to a separate account in administration proceedings, the creditor whose claim has not been previously established has no right to have the whole of the debt paid out of the fund, but only such proportion of it as the fund bears to the whole of the assets distributed by the court².

1 *Beattie v Cordner* [1903] 1 IR 1, CA; affd sub nom *Harrison v Kirk* [1904] AC 1, HL. See also *Browne v Browne* [1919] 1 IR 251. The court requires a creditor to pay the costs of the application: *Harrison v Kirk* supra at 6 per Lord Davey; *Gillespie v Alexander* (1827) 3 Russ 130 at 136 per Lord Eldon LC.

2 *Gillespie v Alexander* (1827) 3 Russ 130; *Greig v Somerville* (1830) 1 Russ & M 338. The fact that funds have been carried to separate credits does not of itself free them from liabilities which could attach to funds standing to a general credit: *O'Neill v M'Grorty* [1915] 1 IR 1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/521. Refunding when the estate has been administered out of court.

521. Refunding when the estate has been administered out of court.

Where the estate has been administered out of court the creditor is entitled to proceed against a legatee for the whole of the debt, and not merely for a proportionate part¹, notwithstanding that the legatee has received payment of his legacy in entire ignorance of the creditor's claim². He is entitled to attack any legatee whom he chooses, and the person attacked is entitled to a contribution from his co-legatees³.

1 *Davies v Nicolson* (1858) 2 De G & J 693.

2 *March v Russell* (1837) 3 My & Cr 31.

3 *Davies v Nicolson* (1858) 2 De G & J 693, where the order was that the specific legatee was liable to pay the creditor, without prejudice to any question between himself, the executor and the residuary legatee.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/522. Insolvent beneficiary.

522. Insolvent beneficiary.

Where the court has directed contribution among the beneficiaries for payment of debts and costs, and one of the beneficiaries is insolvent, it will direct an additional contribution among the solvent beneficiaries¹.

If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter are, subject to any order to the contrary, continued as if he were alive².

1 *Conolly v Farrell* (1846) 10 Beav 142; *Re Peerless, Peerless v Smith* (1901) 45 Sol Jo 670.

2 Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 5(1), Sch 2. Where the estate of a deceased person is insolvent and is being administered otherwise than in bankruptcy the administration is subject to various provisions of the Insolvency Act 1986 as provided for in the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3, Sch 1. See PARA 399 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 823 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(1) LEGACIES AND ANNUITIES/(viii) Refunding/523. Rights of creditors against purchasers.

523. Rights of creditors against purchasers.

Unsatisfied creditors have a right to follow a legacy against volunteers claiming through the legatee, but they have no such right against a purchaser in good faith from the legatee¹. Where the executor has not parted with control over the assets, or where the legacy is represented by a fund in court, the purchaser from the legatee takes subject to the rights of unsatisfied creditors, even if their claims are established after the purchase².

1 *Dilkes v Broadmead* (1860) 2 Giff 113 (on appeal 2 De GF & J 566); *Spackman v Timbrell* (1837) 8 Sim 253. See also the Administration of Estates Act 1925 s 32(2); and PARA 388 ante.

2 *Noble v Brett* (1858) 24 Beav 499; *Hooper v Smart, Piper v Piper, Bailey v Piper* (1875) 1 ChD 90.

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524. Effect of order or enactment protecting representative.

Even if personal representatives have distributed the estate under the protection of a court order, the right of a beneficiary or creditor to follow assets is not affected¹. The right to follow assets is similarly preserved, subject in certain cases to provisions for the protection of purchasers, by the enactments which relate to the protection of personal representatives

against liability in respect of rents and covenants² against claims of which they have not received notice within the time fixed in the statutory advertisements³, and against certain claims by dependants for maintenance⁴ and by the enactments which relate to the effect of an assent or conveyance by personal representatives⁵ against claims by or through adopted or illegitimate children of which they had no notice at the time of conveyance or distribution of the estate⁶. Where the personal representative is protected against claims, the person seeking to follow the assets into the hands of beneficiaries may take proceedings to follow the assets without previously taking proceedings against, or joining, the personal representatives⁷.

1 *Re Gess, Gess v Royal Exchange Assurance* [1942] Ch 37. See also *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723. The effect of distributing under the protection of a court order is to protect the personal representatives but the right of a creditor or beneficiary remains. In the case of small estates the personal representatives may take out missing beneficiary insurance instead: *Re Evans, Evans v Westcombe* [1999] 2 All ER 777. As to following assets see EQUITY vol 16(2) (Reissue) PARA 861 et seq. See also PARA 744 post.

2 See PARA 408 ante.

3 See PARA 383 ante.

4 See PARA 477 note 3 ante.

5 See PARA 388 ante.

6 See PARA 478 ante.

7 *Clegg v Rowland* (1866) LR 3 Eq 368; *Hunter v Young* (1879) 4 ExD 256, CA; *Re Frewen, Frewen v Frewen* (1889) 60 LT 953. See also PARA 518 note 2 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(2) ORDER OF APPLICATION OF ASSETS ON PAYMENT OF PECUNIARY LEGACIES/525. Difficulties of statutory interpretation.

(2) ORDER OF APPLICATION OF ASSETS ON PAYMENT OF PECUNIARY LEGACIES

525. Difficulties of statutory interpretation.

The duty of identifying which parts of the estate are charged with the payment of pecuniary legacies¹, and in what order, is a problem of distribution and is altogether distinct from the administrative question of the order in which the assets are to be applied in payment of the debts and liabilities², although the distinction has not been uniformly observed. The Administration of Estates Act 1925 directs that the estate of a person dying after 1925, if solvent, is to be applied towards the discharge of funeral, testamentary and administration expenses, debts and liabilities, in the statutory order of application of assets³, but makes no mention of legacies. Legacies are, however, referred to in the provisions which set out the statutory order⁴. This has caused difficulty in interpreting the statutory provisions, and the authorities are contradictory and confused, but it is submitted that the law is as stated in the ensuing paragraphs.

1 A 'pecuniary legacy' includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of designated property, and any other general direction by a testator for the payment of money, including all death duties free from which any devise, bequest, or payment is made to take effect: Administration of Estates Act 1925 s 55(1)(ix). See also PARA 472 et seq ante.

- 2 As to the order of payment of debts and liabilities see PARA 416 et seq ante.
- 3 See the Administration of Estates Act 1925 s 34(3); and PARA 416 et seq ante.
- 4 See ibid s 34(3), Sch 1 Pt II paras 1, 2; and PARAS 417-418 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(2) ORDER OF APPLICATION OF ASSETS ON PAYMENT OF PECUNIARY LEGACIES/526. The first fund for payment.

526. The first fund for payment.

Subject to any contrary provisions of the will¹, the first fund for payment of pecuniary legacies, in the case of all deaths after 1925, is any property of the deceased undisposed of by will². With this one exception the legislation of 1925 has not directly³ altered the previous law on this subject, and accordingly the presumption must be that Parliament did not intend to alter the rules⁴ which regulated the matter before 1926 and that these continue to apply⁵.

1 See the Administration of Estates Act 1925 s 33(7); and PARA 555 et seq post. For the meaning of 'will' see PARA 3 note 1 ante.

2 See the Administration of Estates Act 1925 ss 33(2), 34(3), Sch 1 Pt II para 1 (s 33(2) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 5(1), (3)). Both s 33(2) (as amended) and Sch 1 Pt II para 1 require a fund to be set aside, out of property undisposed of by the will, to provide for pecuniary legacies, and from this the necessary implication arises that the fund should be applied for that purpose: see *Re Worthington, Nichols v Hart* [1933] Ch 771, CA; *Re Sanger, Taylor v North* [1939] Ch 238, [1938] 3 All ER 417; *Re Gillett's Will Trusts, Barclays Bank Ltd v Gillett* [1950] Ch 102, [1949] 2 All ER 893; *Re Martin, Midland Bank Executor Trustee Co Ltd v Marfleet* [1955] Ch 698, [1955] 1 All ER 865; *Re Midgley, Barclays Bank Ltd v Midgley* [1955] Ch 576, [1955] 2 All ER 625. For decisions to the contrary see *Re Taylor's Estate and Will Trusts* [1969] 2 Ch 245, [1969] 1 All ER 113; *Re Beaumont's Will Trusts, Walker v Lawson* [1950] Ch 462, [1950] 1 All ER 802 (criticised in *Re Midgley, Barclays Bank Ltd v Midgley* supra); *Re Berrey's Will Trusts, Greening v Waters* [1959] 1 All ER 15, [1959] 1 WLR 30. See also *Re Wilson, Wilson v Mackay* [1967] Ch 53, [1966] 2 All ER 867; and PARA 410 ante.

3 For the effect of the provision by which the payment of debts and liabilities out of residue is made subject to the retention of a fund to meet pecuniary legacies see PARA 418 ante.

4 As to these rules see PARAS 527-530 post.

5 *Re Thompson, Public Trustee v Husband* [1936] Ch 676, [1936] 2 All ER 141; *Re Rowe* [1941] Ch 343, [1941] 2 All ER 330.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(2) ORDER OF APPLICATION OF ASSETS ON PAYMENT OF PECUNIARY LEGACIES/527. General rules before 1926.

527. General rules before 1926.

Before 1926 the general rule was that, in the absence of a sufficient indication of a contrary intention, pecuniary legacies were payable out of the personal estate not specifically bequeathed¹.

Where there was a bequest of pecuniary legacies, and a gift of the residue of the testator's real and personal estate, it was a general rule of construction that the residuary real estate was charged with the payment of the legacies in aid of the personal estate². For the application of this rule it was not necessary that the testator should use the word 'residue', and a gift of realty and personalty in terms which substantially amount to a residuary gift was sufficient³; the rule applied whether the legacies were given before or after the gift of residue⁴. Where there was simply a charge of legacies upon real estate, that charge was nothing more than ancillary to the personal estate, and could not be enforced against the real estate where the personal estate was sufficient to pay all the legacies⁵.

If the personal estate was sufficient at the time the legacy became payable, a subsequent wasting of the assets before the legacy was actually paid would not throw the legacy upon the real estate⁶, except where the executor and the devisee were the same person⁷.

1 *Robertson v Broadbent* (1883) 8 App Cas 812, HL. See also *Re Fowler, Fowler v Wittingham* (1915) 139 LT Jo 183; *Re Thompson, Public Trustee v Husband* [1936] Ch 676, [1936] 2 All ER 141; *Re Rowe* [1941] Ch 343, [1941] 2 All ER 330; *Re Beaumont's Will Trusts, Walker v Lawson* [1950] Ch 462, [1950] 1 All ER 802 (criticised, so far as it relates to the law after 1925, in *Re Midgley, Barclays Bank Ltd v Midgley* [1955] Ch 576, [1955] 2 All ER 625). For the effect of the provision contained in the Administration of Estates Act 1925 by which the payment of debts and liabilities out of residue is made subject to the retention of a fund to meet pecuniary legacies see PARA 418 ante.

2 *Greville v Browne* (1859) 7 HL Cas 689; *Re Brooke, Brooke v Rooke* (1876) 3 ChD 630.

3 *Re Bawden, National Provincial Bank of England v Cresswell, Bawden v Cresswell* [1894] 1 Ch 693; *Re Smith, Smith v Smith* [1899] 1 Ch 365; *Re Balls, Trewby v Balls* [1909] 1 Ch 791. See also *Re Cowell, Temple v Temple* (1920) 150 LT Jo 296.

4 *Re Balls, Trewby v Balls* [1909] 1 Ch 791.

5 *Re Ovey, Broadbent v Barrow* (1885) 31 ChD 113 at 118 per Pearson J. As to where land is specifically devised see PARA 528 post.

6 *Richardson v Morton* (1871) LR 13 Eq 123.

7 *Howard v Chaffers, Howard v Robinson* (1863) 2 Drew & Sm 236; *Humble v Humble* (1838) 2 Jur 696.

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528. Where land is specifically devised.

The presumption is against an intention to charge land specifically devised, and a mere charge on all the testator's land is not sufficient to rebut the presumption¹. However, the question must always be one of intention².

1 *Conron v Conron* (1858) 7 HL Cas 168 at 190 per Lord Cranworth; *Spong v Spong* (1829) 3 Bli NS 84, HL; *Re Chester, Ryan v Chester* (1914) 49 ILT 97.

2 *Bank of Ireland v McCarthy* [1898] AC 181, HL.

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529. Mixed fund.

Where the testator's real and personal property has been so blended together as to form a mixed fund for the payment of legacies, the legacies must be borne by the real and personal estate rateably¹. The rule, however, as to rateable payment out of a mixed fund does not extend beyond the things which the testator has expressly directed to be paid out of the fund², and it may accordingly occur that the realty comprised in the fund may be charged rateably with the payment of debts, but only in aid of the personalty in discharge of the legacies³.

1 *Re Spencer Cooper, Poë v Spencer Cooper* [1908] 1 Ch 130; *Re Owers, Public Trustee v Death* [1941] Ch 17, [1940] 4 All ER 225, CA. As to mixed funds for payment of debts and legacies see PARA 410 ante.

2 *Elliott v Dearsley* (1880) 16 ChD 322 at 329, CA, per James LJ.

3 *Elliott v Dearsley* (1880) 16 ChD 322, CA; *Re Boards, Knight v Knight* [1895] 1 Ch 499 (overruling dictum of Jessel MR in *Gainsford v Dunn* (1874) LR 17 Eq 405 at 408); *Re Thompson, Public Trustee v Husband* [1936] Ch 676, [1936] 2 All ER 141.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(2) ORDER OF APPLICATION OF ASSETS ON PAYMENT OF PECUNIARY LEGACIES/530. Realty may be the primary or exclusive fund for legacies.

530. Realty may be the primary or exclusive fund for legacies.

A testator may make his real estate the primary fund for the payment of legacies. He may also make it the exclusive fund, and questions occasionally arise as to whether the legatee can have recourse to the personalty. Where the testator shows a separate and independent intention that the money is to be paid to the legatee in any event, the intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund¹, and in such a case recourse may be had to the personal estate if the real estate proves deficient². Where, however, the testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment³.

1 *Dickin v Edwards* (1844) 4 Hare 273 at 276 per Wigram V-C.

2 As to those cases in which real estate has been held to be the primary fund see *Savile v Blakett* (1722) 1 P Wms 777 at 778; *Welby v Rockcliffe* (1830) 1 Russ & M 571; *Williams v Hughes* (1857) 24 Beav 474.

3 *Dickin v Edwards* (1844) 4 Hare 273 at 276 per Wigram V-C. See also *Spurway v Glynn* (1804) 9 Ves 483.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(3) THE RESIDUARY ESTATE UNDER A WILL/(i) Residuary Estate given Absolutely/531. What a residuary gift comprises.

(3) THE RESIDUARY ESTATE UNDER A WILL

(i) Residuary Estate given Absolutely

531. What a residuary gift comprises.

A general residuary gift passes everything not disposed of, whether the testator has not attempted to dispose of it or whether the disposition fails by lapse or any other event¹. In order to exclude from such a gift a particular property belonging to the testator and not otherwise disposed of by will it is necessary to find a plain and unequivocal intention on his part not to include that property in the residuary gift; the mere fact that he is under the erroneous impression that the particular property is not his to dispose of does not exclude the property from the residue².

¹ See *Re Bagot, Paton v Ormerod*[1893] 3 Ch 348 at 359, CA, per Lopes LJ; *Easum v Appleford* (1840) 5 My & Cr 56 at 61; *Bernard v Minshull* (1859) John 276; *Re Blight, Blight v Hartnoll*(1883) 23 ChD 218, CA; *Craw's Trustees v Blacklock*1920 SC 22; *Re Barnes' Will Trusts, Prior v Barnes*[1972] 2 All ER 639, [1972] 1 WLR 587. As to the effect of a residuary devise see the Wills Act 1837 s 25 (as amended); and WILLS vol 50 (2005 Reissue) PARA 474. Where a testator is dealing with a definite ascertained sum, the word 'residue' only refers to the exact amount remaining after prior amounts are taken out, and will not catch a share which has failed: *Bagge v Bagge*[1921] 1 IR 213. As to the distinction between a gift of residuary estate and a gift of the residue of residuary estate and the application of lapse see *Re Whitrod, Burrows v Base*[1926] Ch 118. As to the circumstances in which a person is deemed to have an 'absolute interest' in residue for tax purposes see the Income and Corporation Taxes Act 1988 ss 696, 697, 701(2); and INCOME TAXATION vol 23(2) (Reissue) PARAS 1535-1538. As to the dangers of distribution within six months of the date of the grant see PARA 477 ante.

² *Re Bagot, Paton v Ormerod*[1893] 3 Ch 348 at 359, CA, commenting on the earlier decisions in *Circuit v Perry* (1856) 23 Beav 275; *Harris v Harris* (1869) 17 WR 790; *Hawks v Longridge* (1873) 29 LT 449; and *Clibborn v Clibborn* (1857) 2 Ir Jur 386.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(3) THE RESIDUARY ESTATE UNDER A WILL/(i) Residuary Estate given Absolutely/532. Property subject to general power of appointment.

532. Property subject to general power of appointment.

A general devise of the testator's real estate or a general bequest of his personal estate is to be construed as including any real or personal estate, as the case may be, which the testator may have power to appoint in any way he may think proper, and is to operate as an execution of that power in the absence of a contrary intention¹.

¹ See the Wills Act 1837 s 27 (as amended); and POWERS vol 36(2) (Reissue) PARA 310. The instrument creating the power may be so framed as to exclude from the operation of s 27 (as amended) any particular kinds of will: *Phillips v Cayley* (1889) 43 ChD 222 at 233, CA, per Bowen LJ; *Re Davies, Davies v Davies* [1892] 3 Ch 63. As to the effect of an appointment being limited to an extent necessary to pay debts and legacies see *Hawthorn v Shedden* (1856) 3 Sm & G 293; *Re Seabrook, Gray v Baddeley* [1911] 1 Ch 151; *Re Jarrett, Re Vrenegroor, Bird v Green* [1919] 1 Ch 366. As to the exercise of powers by will see POWERS vol 36(2) (Reissue) PARA 310 et seq. As to construction of wills see WILLS vol 50 (2005 Reissue) PARA 476 et seq. References in the Administration of Estates Act 1925 to a deceased person's estate include property over which he exercises a general power of appointment: see the Administration of Estates Act 1925 ss 1(1), 3(1) (as amended), (3); and PARA 372 ante. For the meanings of 'real estate' and 'personal estate' see the Wills Act 1837 s 1 (as amended); and WILLS vol 50 (2005 Reissue) PARA 573.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(3) THE RESIDUARY ESTATE UNDER A WILL/(i) Residuary Estate given Absolutely/533. Failure of share of residue.

533. Failure of share of residue.

Where a gift of part of the residue fails, the lapsed share does not fall into residue, but goes as undisposed of¹. A direction, however, that a revoked² or lapsed share³ is to fall into residue amounts to a gift of that share to the other residuary legatees.

If a legacy given out of a share of residue fails, it goes to the next of kin as undisposed of⁴. Where, however, the will contains a gift over operating upon the share of residue as a whole, the gift of the remaining part of that share carries such a legacy in the event of its failure⁵.

1 *Re Wood's Will* (1861) 29 Beav 236; *Sykes v Sykes* (1868) 3 Ch App 301; *Re Forrest, Carr v Forrest* [1931] 1 Ch 162. See also *Re Bentley, Podmore v Smith* (1914) 110 LT 623; *Re Whitrod, Burrows v Base* [1926] Ch 118.

2 *Re Palmer, Palmer v Answorth* [1893] 3 Ch 369, CA, overruling *Humble v Shore* (1847) 7 Hare 247. See also *Re Forrest, Carr v Forrest* [1931] 1 Ch 162.

3 *Re Allan, Dow v Cassaigne* [1903] 1 Ch 276, CA.

4 *Lloyd v Lloyd* (1841) 4 Beav 231, applied in *Green v Pertwee* (1846) 5 Hare 249 but doubted in *Re Judkin's Trusts* (1884) 25 ChD 743 at 750 per Kay J.

5 *Re Parker, Stephenson v Parker* [1901] 1 Ch 408, doubting *Skrymsher v Northcote* (1818) 1 Swan 566.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(3) THE RESIDUARY ESTATE UNDER A WILL/(i) Residuary Estate given Absolutely/534. Residuary legatee's right to have residue ascertained.

534. Residuary legatee's right to have residue ascertained.

A residuary legatee has a right to insist that the executor pay the debts, legacies and funeral and testamentary expenses with due diligence, so that the clear residue may be ascertained and paid over to him, or, if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled¹; but the effect of the bequest is not to vest in him any particular asset of the testator².

1 *Wightwick v Lord* (1857) 6 HL Cas 217 at 226. As to the executor's duty to pay debts see PARA 384 et seq ante. As to the executor's duty in respect of legacies see PARA 476 ante.

2 See PARA 341 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(3) THE RESIDUARY ESTATE UNDER A WILL/(ii) Residuary Estate Settled/535. Valuation of estate for purposes of hotchpot.

(ii) Residuary Estate Settled

535. Valuation of estate for purposes of hotchpot.

Where a testator has provided that advances made to beneficiaries in his lifetime are to be brought into account against their shares in his residuary estate, or where hotchpot otherwise applies¹, the general rule is, it seems, that in the absence of a contrary direction in the will, the estate and the beneficiaries' interests in it² are to be valued at the date of distribution and not at the date of the testator's death³.

The date of valuation must control not only the division of the capital but also the mode of dealing with the individual income⁴. Two methods can be adopted, but there is a conflict of authority as to which method is prima facie applicable where there is nothing in the context to show the testator's intention⁵. The first method is to value the distributable fund at death and add to that the sum to be brought into hotchpot, and then ascertain the fractions which are to be applied to the distribution of intermediate income and capital when it falls to be distributed⁶. The second method is to deal with the income by adding interest at the legacy rate⁷ on the amount of the advances to the income actually received between the date of death and the date of actual distribution, and then divide the resulting income among the beneficiaries, debiting the advanced beneficiary with interest on the advances. On distribution of the capital the amount of the advances is then added to the sum of money to be divided which is actually in the trustees' hands. The gross sums are then divided between the beneficiaries and the advanced beneficiary is debited with the advance⁸.

1 Eg under the rule against double portions: see EQUITY vol 16(2) (Reissue) PARA 745. As to hotchpot see PARA 616 post.

2 Life interests are actuarially valued: *Re Morton, Morton v Warham*[1956] Ch 644, [1956] 3 All ER 259.

3 *Re Hillas-Drake, National Provincial Bank Ltd v Liddell*[1944] Ch 235, [1944] 1 All ER 375; *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee*[1962] 1 All ER 542, [1962] 1 WLR 496, not following *Re Gunther's Will Trusts, Alexander v Gunther*[1939] Ch 985, [1939] 3 All ER 291; *Re Oram, Oram v Oram*[1940] Ch 1001, [1940] 4 All ER 161. The question is, however, not resolved: see the text and notes 5-7 infra; and WILLS vol 50 (2005 Reissue) PARA 689.

4 *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee*[1962] 1 All ER 542 at 549, [1962] 1 WLR 496 at 506 per Cross J.

5 *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee*[1962] 1 All ER 542 at 549, [1962] 1 WLR 496 at 506-507 per Cross J (where the court considered that it was free to adopt whichever of the two methods seemed the more appropriate, but Cross J held that prima facie the second method ought to be adopted). In *Re Hillas-Drake, National Provincial Bank Ltd v Liddell*[1944] Ch 235, [1944] 1 All ER 375, Simonds J held that the second method should be adopted where there is no express direction in the will to the contrary. See WILLS vol 50 (2005 Reissue) PARA 689.

6 *Re Mansel, Smith v Manse*[1930] 1 Ch 352.

7 Ie interest at the rate of 6% per annum: see CPR Sch 1 RSC Ord 44 r 10; and PARA 499 ante. As to the CPR see PARA 37 note 3 ante.

8 *Re Wills, Dulverton v Macleod*[1939] Ch 705; *Re Hillas-Drake, National Provincial Bank Ltd v Liddell*[1944] Ch 235, [1944] 1 All ER 375; *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee*[1962] 1 All ER 542 at 549, [1962] 1 WLR 496 at 506 per Cross J. On a division of funds the values at the date of distribution should be adjusted by adding the amounts paid for inheritance tax because the division should be considered as made before payment of that tax: see *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* supra, following *Re Tollemache, Forbes v Public Trustee* [1930] WN 138. As to the burden of inheritance tax on death see PARA 546 post; and INHERITANCE TAXATION.

UPDATE

535 Valuation of estate for purposes of hotchpot

NOTE 7--CPR Sch 1 RSC Ord 44 r 10 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(3) THE RESIDUARY ESTATE UNDER A WILL/(ii) Residuary Estate Settled/536. Ascertaining the income of the residue: the rule in *Allhusen v Whittell*.

536. Ascertaining the income of the residue: the rule in *Allhusen v Whittell*.

The tenant for life of the residuary estate is normally entitled to the income of that estate from the date of death¹. He is not, however, entitled to the whole of the income actually derived from the estate and he is not entitled to the income arising from what is wanted for payment of debts or legacies, unless the will expressly provides to the contrary², because that never becomes residue in any way whatever. Accordingly, although executors are at liberty, as between themselves and the persons interested in the residue, to have recourse to any funds they please in order to pay debts and legacies, yet in adjusting accounts between the tenant for life and the remainderman the rule is that they must be treated as having paid the debts and legacies (other than contingent legacies³) not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion⁴, is sufficient for the purpose⁵. The apportionment under the rule is to be made by ascertaining what portion of capital, together with interest on it from the death to the date of payment of each debt or legacy, was necessary to discharge the debt or legacy⁶.

1 See eg *Angerstein v Martin* (1823) Turn & R 232; *Hewitt v Morris* (1824) Turn & R 241; *La Terriere v Bulmer* (1827) 2 Sim 18. As to apportionment on the death of a tenant for life see *Re Henderson, Public Trustee v Reddie* [1940] Ch 368, [1940] 1 All ER 623; and SETTLEMENTS vol 42 (Reissue) PARAS 957-960.

2 See *Re Ullswater, Barclays Bank Ltd v Lowther* [1952] Ch 105, [1951] 2 All ER 989.

3 The rule stated in the text does not apply to contingent legacies: see *Allhusen v Whittell* (1867) LR 4 Eq 295 at 303; *Re Fenwick's Will Trusts, Fenwick v Stewart* [1936] Ch 720, [1936] 2 All ER 1096.

4 As to the taxation consequences of the rule and the definition of 'limited interest' in the Income and Corporation Taxes Act 1988 s 701(3) see INCOME TAXATION vol 23(2) (Reissue) PARA 1531.

5 *Allhusen v Whittell* (1867) LR 4 Eq 295. As to the application of the rule to sums paid by executors in respect of rents and outgoing under short leases and sums paid by them to assignees of the leases in consideration of their relieving the estate from liability under such leases see *Re Shee, Taylor v Stoger* [1934] Ch 345. In applying the rule the income of the estate is the net income after deduction of tax: *Re Oldham, Oldham v Myles* (1927) 71 Sol Jo 491. The rule applies not only to payments made during the first year, but to payments made during subsequent years: *Re Wills, Wills v Hamilton* [1915] 1 Ch 769. The average rate of interest earned in each year should be adopted for the purpose of calculation: *Re Wills, Wills v Hamilton* supra; *Re Shee, Taylor v Stoger* supra.

6 *Re McEuen, McEuen v Phelps* [1913] 2 Ch 704, CA; *Re Wills, Wills v Hamilton* [1915] 1 Ch 769. It is established by these cases, however, that the rule in *Allhusen v Whittell* (1867) LR 4 Eq 275 is not universal, but that the court, in adjusting accounts, will deal equitably between the tenant for life and the remainderman.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(3) THE RESIDUARY ESTATE UNDER A WILL/(ii) Residuary Estate Settled/537. Interest on legacies.

537. Interest on legacies.

Where a testator's residuary estate bequeathed in trust for a beneficiary for life and remaindermen yields an income of an average below 6 per cent on the capital, the difference between the interest at 6 per cent payable on pecuniary legacies bequeathed by the will¹ and the interest actually produced by the amounts of the estate representing those legacies must be deducted from the capital of the estate as from the testator's death instead of being paid as against the tenant for life out of the income of the rest of the estate².

1 See PARA 499 ante.

2 *Massy v Gahan* (1889) 23 LR Ir 518. See also *Allhusen v Whittell* (1867) LR 4 Eq 295. See also PARA 499 ante.

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538. Real estate charged with debts.

Where real estate is charged with debts and recourse is had to the real estate, then, as from the testator's death, the tenant for life must keep down the interest upon all the debts bearing interest, for payment of which recourse is had to the real estate¹.

1 *Marshall v Crowther* (1874) 2 ChD 199.

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539. Annuities.

Where the testator was liable as a debtor to pay an annuity created before his death either of two courses may, it seems, in general be adopted. The successive instalments of the annuity may be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's death¹, or the sum required for the payment of each instalment may be apportioned by calculating what sum set aside at the testator's death and accumulated at simple interest would have met the particular payment, the sum so ascertained to be attributed to capital, and the accumulated interest to income².

Special circumstances may suggest or require other methods, for example where the annuity had been given in consideration of a loan to avoid the laws against usury it was treated as an ordinary mortgage, the tenant for life being only liable to keep down the interest³; and where the testator's estate was liable for a periodic payment of uncertain amount which was compromised after his death for payment of a lump sum, this was treated as an ordinary debt of the estate⁴; but in such cases it would seem that there ought to be an apportionment

between capital and income⁵. The rate of interest to be employed in the calculation depends on the rate for the time being produced by the estate⁶.

The rule does not apply to contingent legacies as opposed to contingent debts⁷.

If neither the testator nor his estate were liable in respect of the annuity, but it is merely a charge on the property, it must be borne entirely by the tenant for life⁸.

1 *Yates v Yates* (1860) 28 Beav 637; *Re Dawson, Arathoon v Dawson* [1906] 2 Ch 211.

2 *Re Earl of Berkeley, Inglis v Countess of Berkeley* [1968] Ch 744 at 754, [1968] 3 All ER 364 at 369, CA, per Harman LJ; *Re Perkins, Brown v Perkins* [1907] 2 Ch 596, where the gift of the life estate was contingent and, in the calculation, the date taken for setting aside the sum was not the testator's death but the day on which the gift of the life estate vested. The above principle was adopted in *Re Thompson, Thompson v Watkins* [1908] WN 195; *Re Poyser, Landon v Poyser* [1910] 2 Ch 444. See also *Re Darby, Russell v MacGregor* [1939] Ch 905 at 914-915, [1939] 3 All ER 6 at 12, CA, per Sir Wilfrid Greene MR. As to the rate of interest see the text and note 6 infra. It is thought that in view of the above cases the earlier decisions in *Re Muffett, Jones v Mason* (1888) 39 ChD 534 (explained and followed in *Re Bacon, Grissel v Leathes* (1893) 62 LJ Ch 445. See also Seton's Judgments and Orders (7th Edn) 1567); *Re Harrison, Townson v Harrison* (1889) 43 ChD 55; and (except so far as it would be regarded as an exercise of the court's discretion in special circumstances) *Re Henry, Gordon v Gordon* [1907] 1 Ch 30 (where the tenant for life was recouped out of capital, or held entitled to a charge upon capital, for all payments of the annuity) would not now be followed.

3 *Bulwer v Astley* (1844) 1 Ph 422.

4 *Re Henry, Gordon v Gordon* [1907] 1 Ch 30.

5 Cf *Re Shee, Taylor v Stoger* [1934] Ch 345 (sums paid by executors in respect of liabilities under leases held to be apportionable on the principle recognised in *Allhusen v Whittell* (1874) LR 4 Eq 295 (see PARA 536 ante)).

6 See the cases cited on this point in PARA 536 note 5 ante. Where the estate was invested in consols different rates have been adopted: see *Re Perkins, Brown v Perkins* [1907] 2 Ch 596 (3%); *Re Poyser, Landon v Poyser* [1910] 2 Ch 444 (3.5%). See also PARA 504 ante.

7 *Re Fenwick's Will Trusts, Fenwick v Stewart* [1936] Ch 720, [1936] 2 All ER 1096.

8 *Re Popham, Butler v Popham* (1914) 111 LT 524; *Re Darby, Russell v MacGregor* [1939] Ch 905, [1939] 3 All ER 6, CA, overruling on this point *Re Thompson, Thompson v Watkins* [1908] WN 195.

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540. The rule in *Howe v Earl of Dartmouth*.

Where the residuary personal estate¹ is settled, in the absence of any evidence of a contrary intention², it is to be assumed that the testator intended that his legatees should enjoy the same thing in succession. In order, accordingly, to give effect to his intention, the rule is that such parts of the estate as are of a wasting or reversionary character, or are represented by securities of a hazardous nature, ought, as between the tenant for life and the remainderman, to be converted and invested in permanent investments of a recognised character³. The same principle applies where the testator bequeaths life annuities out of wasting property; the property should be sold and a permanent fund created for payment of the annuities⁴. The rule⁵ is commonly excluded but there is a wealth of authority on when it applies. The rules concerning its application are complex and technical⁶.

1 The rule does not, and never did, apply to real estate: see PARA 541 post.

2 See eg *Re Scholfield's Wills Trusts*, *Scholfield v Scholfield* [1949] Ch 341, [1949] 1 All ER 490, where the testator intended that benefits payable out of the income from his leaseholds should expire with the leaseholds. War damage compensation was ordered to be invested in annuities to produce a similar result.

3 *Howe v Earl of Dartmouth*, *Howe v Countess of Aylesbury* (1802) 7 Ves 137; *Pickering v Pickering* (1839) 4 My & Cr 289; *Cafe v Bent* (1845) 5 Hare 24 at 35; *Pickup v Atkinson* (1846) 4 Hare 624 at 628; *Macdonald v Irvine* (1878) 8 ChD 101 at 112, CA; *Re Van Straubenzee*, *Boustead v Cooper* [1901] 2 Ch 779 at 782; *Re Bates*, *Hodgson v Bates* [1907] 1 Ch 22 at 26. See also TRUSTS vol 48 (2007 Reissue) PARAS 745-746.

4 *Fryer v Buttar* (1837) 8 Sim 442; *Wightwick v Lord* (1857) 6 HL Cas 217.

5 Strictly the rule in *Howe v Earl of Dartmouth* only applies where there is no trust for conversion. The analogous rule where there is such a trust is sometimes referred to as the rule in *Dimes v Scott* (1828) 4 Russ 195, or the rule in *Gibson v Bott* (1802) 7 Ves 89, but it is a common practice to refer to both rules under the single name. See also *Re Berry*, *Lloyds Bank Ltd v Berry* [1962] Ch 97 at 106, [1961] 1 All ER 529 at 535 per Pennycuik J. There is a third rule, also referred to under the same name, in *Re Chesterfield's Trusts* (1883) 24 ChD 643 which applies to reversions or other non-income yielding property apportioned retrospectively partially to income when they fall in or are sold. A clause in a will excluding the rule in *Howe v Earl of Dartmouth* supra also excludes the rule in *Re Chesterfield's Trusts* supra: *Re Hey's Settlement Trusts*, *Hey v Nickell-Lean* [1945] 1 All ER 618 at 627 per Cohen J.

6 See PARA 541 et seq post.

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541. Exceptions.

The rule in *Howe v Earl of Dartmouth*¹ does not, and never did, apply to real estate² nor does it apply to leaseholds with an unexpired term of more than 60 years treated as settled land³ or after 1925 to leaseholds held upon trust for sale⁴, or, it seems, to property as to which a person dies wholly or partially intestate after 1925⁵, but it continues to apply to pure personalty⁶. The rule does not apply to a contingent legacy⁷.

The rule is not to be applied in cases in which there is an indication of an intention that the property should be enjoyed in specie; but, although small indications of such an intention may be sufficient, the burden of showing the intention is upon those who desire to exclude the operation of the rule⁸. The rule does not apply in the case of immovables situated in a foreign country⁹.

A discretionary power to postpone sale, now implied into all trusts for sale of land¹⁰, may also be sufficient to exclude the application of the rule¹¹.

1 See PARA 540 ante.

2 *Re Woodhouse* [1941] Ch 332 at 335, [1941] 2 All ER 265 at 267 per Simonds J. See also *Re Searle*, *Searle v Baker* [1900] 2 Ch 829; *Re Earl Darnley*, *Clifton v Darnley* [1907] 1 Ch 159; *Hope v d'Hedouville* [1893] 2 Ch 361; *Casamajor v Stode* (1809) 19 Ves 390n; *Fitzgerald v Jervoise* (1820) 5 Madd 25; *Yates v Yates* (1860) 28 Beav 637; *Re Oliver*, *Wilson v Oliver* [1908] 2 Ch 74 (where there were mixed funds in which cases the tenant for life was held entitled to the income of real estate pending conversion under a trust for sale; conversely, where money is directed to be invested in real estate, the beneficiary for life is entitled to the income until the investment is made); *Sitwell v Bernard* (1801) 6 Ves 520; *Kilvington v Gray* (1825) 2 Sim & St 396; *Tucker v Boswell* (1843) 5 Beav 607; *Macpherson v Macpherson* (1852) 19 LTOS 221, HL.

3 *Re Gough*, *Phillips v Simpson* [1957] Ch 323, [1957] 2 All ER 193.

4 The rule was excluded by statute in respect of a trust for sale of land coming into operation before or after 1925 (see the Law of Property Act 1925 s 28(2) (repealed); and REAL PROPERTY vol 39(2) (Reissue) PARA 67) whether the trust was expressly created by the will or by statute: see *Re Brooker, Brooker v Brooker* (1926) 70 Sol Jo 526; *Re Berton, Vandyk v Berton* [1938] 4 All ER 286.

5 *Re Thornber, Crabtree v Thornber* [1937] Ch 29, [1936] 2 All ER 1594, CA. See also PARA 583 post.

6 *Re Trollope's Will Trusts, Public Trustee v Trollope* [1927] 1 Ch 596.

7 *Re Fenwick's Will Trusts, Fenwick v Stewart* [1936] Ch 720, [1936] 2 All ER 1096.

8 *Morgan v Morgan* (1851) 14 Beav 72 at 82; *Macdonald v Irvine* (1878) 8 ChD 101 at 124, CA; *Re Eaton, Danies v Eaton* (1894) 70 LT 761; *Stanier v Hodgkinson* (1903) 73 LJ Ch 179; *Re Inman, Inman v Inman* [1915] 1 Ch 187; *Re Slater, Slater v Jonas* (1915) 85 LJ Ch 432; *Re Aste, Mossop v Macdonald* (1918) 87 LJ Ch 660; *Re Grant, Grant v Grant* (1920) 150 LT Jo 296; *Re Corelli* (1925) 69 Sol Jo 525; *Re Barratt, National Provincial Bank v Barratt* [1925] Ch 550. In the following cases the language was not considered sufficiently strong to exclude the rule: *Re Hubbuck, Hart v Stone* [1896] 1 Ch 754, CA; *Re Game, Game v Young* [1897] 1 Ch 881; *Re Wareham, Wareham v Brewin* [1912] 2 Ch 312, CA; *Re Evans' Will Trusts, Pickering v Evans* [1921] 2 Ch 309. See also TRUSTS vol 48 (2007 Reissue) PARA 746.

9 *Re Moses, Moses v Valentine* [1908] 2 Ch 235.

10 Since 1 January 1997 in the case of every trust for sale of land created by a disposition whether before or after that date there is implied a power for the trustees to postpone sale of the land: see the Trusts of Land and Appointment of Trustees Act 1996 s 4(1), (2); and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

11 *Simpson v Lester* (1858) 4 Jur NS 1269; *Re Pitcairn, Brandreth v Colvin* [1896] 2 Ch 199; *Re Bentham, Pearce v Bentham* (1906) 94 LT 307. Cf *Yates v Yates* (1860) 28 Beav 637; *Re Llewellyn's Trusts* (1861) 29 Beav 171; *Brown v Gellatly* (1867) 2 Ch App 751. See also PARA 543 post.

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542. Effect of trust for conversion.

On 1 January 1997 the doctrine of conversion was abolished in relation to trusts for sale of land, and in relation to trusts to invest personalty in the purchase of land except in relation to trusts for sale created by will where the testator died before that date¹. An interest under a trust for sale of land will now pass under a gift of residuary realty and the rule in *Howe v Earl of Dartmouth*², which never applied to realty, will not therefore apply to such property³. Subject to that, the rule applies where there is a trust for conversion⁴, even though there is a discretionary power to postpone conversion, or to retain existing securities⁵, unless the power amounts to a power to postpone or retain permanently for the benefit of the tenant for life⁶, or unless there is a gift to the tenant for life of the actual income derived from the estate pending the conversion⁷. In the last mentioned case, however, the discretion does not go so far as to enable the executor to alter the parties' rights, except in so far as he may do so by postponing the conversion of one portion of the estate rather than another as a matter of management⁸.

1 See the Trusts of Land and Appointment of Trustees Act 1996 s 3(1), (2); and REAL PROPERTY vol 39(2) (Reissue) PARA 77; SETTLEMENTS vol 42 (Reissue) PARA 897. Subject to the exception referred to in the text, these provisions take effect whether the trust is created or arises before or after 1 January 1997: see s 3(3).

2 See PARA 540 ante.

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 3(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 77; SETTLEMENTS vol 42 (Reissue) PARA 897.

4 See *Dimes v Scott* (1828) 4 Russ 195; *Gibson v Bott* (1802) 7 Ves 89 at 98; *Caldecott v Caldecott* (1842) 1 Y & C Ch Cas 312; *Brown v Gellatly* (1867) 2 Ch App 751; *Furley v Hyder* (1873) 42 LJ Ch 626; *Wentworth v Wentworth* [1900] AC 163, PC.

5 *Re Carter* (1892) 41 WR 140; *Re Woods, Gabellini v Woods* [1904] 2 Ch 4; *Re Chaytor, Chaytor v Horn* [1905] 1 Ch 233; *Re Parry, Brown v Parry* [1947] Ch 23, [1946] 2 All ER 412; *Re Berry, Lloyds Bank Ltd v Berry* [1962] Ch 97, [1961] 1 All ER 529.

6 *Re Inman, Inman v Inman* [1915] 1 Ch 187; *Re Rogers, Public Trustee v Rogers* [1915] 2 Ch 437. In the case of all trusts for sale of land created by a devise or bequest or an appointment of property contained in a will there is implied, despite any provision to the contrary made in the disposition, a power for the trustees to postpone sale of the land: see the Trusts of Land and Appointment of Trustees Act 1996 s 4(1), (2); the Law of Property Act 1925 s 205(1)(ii); and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

7 *Wrey v Smith* (1844) 14 Sim 202; *Mackie v Mackie* (1845) 5 Hare 70; *Re Chancellor, Chancellor v Brown* (1884) 26 ChD 42 at 46, CA; *Re Thomas, Wood v Thomas* [1891] 3 Ch 482; *Re Elford, Elford v Elford* [1910] 1 Ch 814; *Re Sherry, Sherry v Sherry* [1913] 2 Ch 508; *Re Godfree, Godfree v Godfree* [1914] 2 Ch 110; *Re Slater, Slater v Jonas* (1915) 85 LJ Ch 432.

8 *Rowlls v Bebb, Re Rowlls, Walters v Treasury Solicitor* [1900] 2 Ch 107 at 117, CA, per Lindley MR.

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543. Where there is no trust for conversion.

The mere absence of a direction to convert is not sufficient to exclude the operation of the rule in *Howe v Earl of Dartmouth*¹; but, where there is no trust for conversion, an express power to retain existing investments is sufficient to exclude it², and for this purpose there is no distinction between unauthorised securities of a wasting and those of a permanent nature³.

1 *Morgan v Morgan* (1851) 14 Beav 72. See also *Taylor v Clark* (1841) 1 Hare 161; *Meyer v Simonsen* (1852) 5 De G & Sm 723 at 727; *Porter v Baddeley* (1877) 5 ChD 542; *Re Eaton, Daines v Eaton* [1894] WN 95. As to the rule in *Howe v Earl of Dartmouth* see PARA 540 ante.

2 *Gray v Siggers* (1880) 15 ChD 74; *Re Sheldon, Nixon v Sheldon* (1888) 39 ChD 50; *Re Bates, Hodgson v Bates* [1907] 1 Ch 22; *Re Nicholson, Eade v Nicholson* [1907] 2 Ch 111, disapproving *Porter v Baddeley* (1877) 5 ChD 542.

3 *Re Nicholson, Eade v Nicholson* [1907] 2 Ch 111, setting at rest the doubt raised by North J in *Re Sheldon, Nixon v Sheldon* (1888) 39 ChD 50, and by Kekewich J in *Re Bates, Hodgson v Bates* [1907] 1 Ch 22 as to whether such a distinction ought to be made.

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544. Adjustment where income-producing property is retained.

Where income-producing property which ought to have been converted by the executor is in fact retained, the rights of the tenant for life and remainderman are adjusted upon the following basis. Where there is a direction to convert but no express power to postpone¹, or the

duty to convert is implied under the rule in *Howe v Earl of Dartmouth*², the property is valued as at the expiration of one year after the testator's death; where there is a direction to convert coupled with an express power to postpone conversion, the date of valuation is the death of the testator³. In either case the tenant for life is allowed interest upon the ascertained value⁴, and the balance of the income actually produced is capitalised. The tenant for life is entitled to the income derived from the investments of the capitalised income⁵. If the income is insufficient to pay the interest, the tenant for life can be recouped from capital when the investments are sold⁶. As to the rate of interest, the traditional rate allowed is 4 per cent⁷, but this is not a hard and fast rule and the rate can be changed by the court if conditions as to rates of interest generally justify an alteration⁸.

1 *Re Fawcett* [1940] Ch 402. See also *Dimes v Scott* (1828) 4 Russ 195; *Mehrtens v Andrews* (1839) 3 Beav 72; *Taylor v Clark* (1841) 1 Hare 161; *Wilkinson v Duncan* (1857) 23 Beav 469. Cf *Johnson v Routh* (1857) 27 LJ Ch 305; *Hume v Richardson* (1862) 4 De GF & J 29; *Jackson v Jackson* (1869) 17 WR 547; *Re Hazeldine, Public Trustee v Hazeldine* [1918] 1 Ch 433.

2 *Morgan v Morgan* (1851) 14 Beav 72; *Re Wareham, Wareham v Brewin* [1912] 2 Ch 312, CA; *Re Evans' Will Trusts, Pickering v Evans* [1921] 2 Ch 309; *Yates v Yates* (1860) 28 Beav 637 (power of sale). As to the rule see PARA 540 ante.

3 *Re Parry, Brown v Parry* [1947] Ch 23, [1946] 2 All ER 412. See also *Allhusen v Whittell* (1867) LR 4 Eq 295; *Furley v Hyder* (1873) 42 LJ Ch 626; *Re Woods, Gabellini v Woods* [1904] 2 Ch 4; *Re Chaytor, Chaytor v Horn* [1905] 1 Ch 233; *Re Owen, Slater v Owen* [1912] 1 Ch 519; *Re Beech, Saint v Beech* [1920] 1 Ch 40; *Re Baker, Baker v Public Trustee* [1924] 2 Ch 271. Cf *Re Lynch Blossie, Richards v Lynch Blossie* [1899] WN 27; *Re Llewellyn's Trusts* (1861) 29 Beav 171 (power to sell and retain).

4 Interest is allowed on the investments valued en bloc, not on the value of each investment separately: *Re Owen, Slater v Owen* [1912] 1 Ch 519; *Re Fawcett* [1940] Ch 402. As to interest rates see PARA 499 ante; and note 8 infra.

5 *Brown v Gellatly* (1867) 2 Ch App 751; *Re Beech, Saint v Beech* [1920] 1 Ch 40; *Re Fawcett* [1940] Ch 402. As to where conversion is expressly postponed see *Green v Britten* (1863) 1 De GJ & Sm 649; *Re Lambert, Lambert v Lambert* (1892) 36 Sol Jo 327. As to the position where a tenant for life has received the income of an unauthorised investment made by the trustees of a settlement see *Re Hoyles, Row v Jagg (No 2)* [1912] 1 Ch 67; and TRUSTS vol 48 (2007 Reissue) PARA 1104. As to the rights of beneficiaries for life and in remainder in the case of a compulsory sale of property see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 682, 683.

6 *Re Fawcett* [1940] Ch 402.

7 *Re Fawcett* [1940] Ch 402; *Re Parry, Brown v Parry* [1947] Ch 23, [1946] 2 All ER 412. See also *Brown v Gellatly* (1867) 2 Ch App 751; *Re Beech, Saint v Beech* [1920] 1 Ch 40; *Meyer v Simonsen* (1852) 5 De G & Sm 723 at 727. Cf *Re Woods, Gabellini v Woods* [1904] 2 Ch 4 at 13; *Re Chaytor, Chaytor v Horn* [1905] 1 Ch 233 at 241 (where 3% was fixed); and PARA 545 note 1 post. It is submitted that the prescribed legacy rate of 6% would now be an appropriate starting point: see CPR Sch 1 RSC Ord 44 r 10; and PARA 499 ante. As to the CPR see PARA 37 note 3 ante.

8 *Re Parry, Brown v Parry* [1947] Ch 23, [1946] 2 All ER 412. In general interest rates of 8 and 9% have been applied at times of high general rates.

UPDATE

544 Adjustment where income-producing property is retained

NOTE 7--CPR Sch 10 RSC Ord 44 r 10.

545. Adjustment where reversionary property is retained.

Where the property which ought to have been sold consists of personal estate which eventually falls in some years after the testator's death, the apportionment is made by ascertaining what sum put out at interest traditionally at 4 per cent¹ on the day of the testator's death, and accumulated at compound interest with a deduction for income tax, would, with the accumulations of interest, have produced at the day of receipt the amount actually received; the sum so ascertained is to be treated as capital, and the residue as income². This principle applies not only to reversions³ but generally to property which is outstanding, for example, policies on the life of a third person⁴, capital money payable by instalments⁵, compensation payable under the town and country planning legislation⁶, royalties⁷, monthly sums payable under a policy⁸, sums payable under a service agreement for a period after the death⁹, or any portions of the estate upon which the income is for any reason not paid in due course¹⁰. The principle does not apply to property in which the testator's interest was an immediate absolute interest subject only to a charge on income¹¹.

1 The rate of interest allowed has usually been 4% (*Turner v Newport* (1846) 2 Ph 14 at 18; *Re Earl of Chesterfield's Trusts* (1883) 24 ChD 643 at 653-654), but in some cases only 3% has been allowed (*Re Hengler, Frowde v Hengler* [1893] 1 Ch 586; *Rowlls v Bebb*, *Re Rowlls*, *Walters v Treasury Solicitor* [1900] 2 Ch 107, CA; *Re Duke of Cleveland's Estate*, *Hay v Wolmer* [1895] 2 Ch 542; and see *Re Goodenough*, *Marland v Williams* [1895] 2 Ch 537; *Re Davy*, *Hollingsworth v Davy* [1908] 1 Ch 61 at 64-65, CA, per Cozens-Hardy MR); but the rate generally allowed is 4% (*Re Evans' Will Trusts*, *Pickering v Evans* [1921] 2 Ch 309; *Re Baker*, *Baker v Public Trustee* [1924] 2 Ch 271). See also PARA 544 ante. The court has a discretion to direct payment at a higher rate and could well do so where there would otherwise be a discrepancy between this and other comparable rates.

2 *Re Earl of Chesterfield's Trusts* (1883) 24 ChD 643; *Re Hollebone*, *Hollebone v Hollebone* [1919] 2 Ch 93. The rule laid down in these cases has no application to real estate: *Re Woodhouse* [1941] Ch 332, [1941] 2 All ER 265. The rule in *Re Earl of Chesterfield's Trusts* supra was cited and applied by Wilberforce J in *Re Chance's Will Trusts*, *Westminster Bank v Chance* [1962] Ch 593 at 608, [1962] 1 All ER 942 at 949.

3 See eg *Wilkinson v Duncan* (1857) 23 Beav 469; *Wright v Lambert* (1877) 6 ChD 649; *Rowles v Bebb*, *Re Rowlls*, *Walters v Treasury Solicitor* [1900] 2 Ch 107, CA. See also *Re Hobson*, *Walker v Appach* (1885) 55 LJ Ch 422.

4 *Re Morley*, *Morley v Haig* [1895] 2 Ch 738; *Re Earl of Chesterfield's Trusts* (1883) 24 ChD 643.

5 *Re Hollebone*, *Hollebone v Hollebone* [1919] 2 Ch 93; *Re Guinness's Settlement*, *Guinness v SG Warburg (Executor and Trustee) Ltd* [1966] 2 All ER 497, [1966] 1 WLR 1355, following *Re Hey's Settlement Trusts* [1945] Ch 294.

6 *Re Chance's Will Trusts*, *Westminster Bank v Chance* [1962] Ch 593, [1962] 1 All ER 942. As to town and country planning legislation see generally TOWN AND COUNTRY PLANNING.

7 *Re Evans' Will Trusts*, *Pickering v Evans* [1921] 2 Ch 309.

8 *Re Fisher*, *Harris and Fisher v Fisher* [1943] Ch 377, [1943] 2 All ER 615.

9 *Re Payne*, *Westminster Bank Ltd v Payne* [1943] 2 All ER 675.

10 See *Turner v Newport* (1846) 2 Ph 14 (bond debt); *Beavan v Beavan* (1869) 24 ChD 649n (mortgage debt with arrears of interest; arrears of annuity and interest); *Re Earl of Chesterfield's Trusts* (1883) 24 ChD 643 (mortgage debt with arrears of interest). See also *Re Duke of Cleveland's Estate*, *Hay v Wolmer* [1895] 2 Ch 542 (money paid away from testator's estate but afterwards recovered); *Delves v Newington* (1885) 52 LT 512.

11 *Re Holliday*, *Houghton v Adlard* [1947] Ch 402, [1947] 1 All ER 695.

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(iii) Incidence of Death Duties

546. Burden of inheritance tax on death.

Subject to any contrary intention shown by a testator in his will¹, inheritance tax² including any interest on that tax³ payable by the deceased's personal representatives⁴ is treated as part of the general testamentary and administration expenses of the estate⁵ but only so far as it is attributable to the value of property in the United Kingdom which (1) vests in the deceased's personal representatives⁶; and (2) was not immediately before the death comprised in a settlement⁷.

Where any amount of inheritance tax paid by the personal representatives does not fall to be borne as part of the general testamentary and administration expenses of the estate, that amount must, where occasion requires, be repaid to them by the person in whom the property to the value of which the tax and interest is attributable is vested⁸.

1 See the Inheritance Tax Act 1984 s 211(2); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651. As to when a testator shows a contrary intention in his will see PARA 547 post.

2 Inheritance tax is payable on the value transferred by a chargeable transfer deemed to have been made on death: see *ibid* s 1; and INHERITANCE TAXATION vol 24 (Reissue) PARAS 407-409. Inheritance tax is an amended and renamed version of capital transfer tax, the amendments being effective for deaths and other chargeable events on or after 18 March 1986 and the renaming being effective for deaths and other chargeable events occurring on or after 25 July 1986: see INHERITANCE TAXATION vol 24 (Reissue) PARA 403. Capital transfer tax replaced estate duty and was leviable on deaths after 12 March 1975: see INHERITANCE TAXATION vol 24 (Reissue) PARA 402. Estate duty remains chargeable on deaths occurring before 13 March 1975 and the transitional provisions applicable to deaths occurring between 12 November 1974 and 13 March 1975 are still in force: see the Finance Act 1975 s 49 (as amended); and INHERITANCE TAXATION vol 24 (Reissue) PARAS 402, 404. Certain other obsolete death duties were also finally abolished by s 50: see INHERITANCE TAXATION vol 24 (Reissue) PARA 401; and PARAS 552, 554 post.

3 See the Inheritance Tax Act 1984 s 211(4); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

4 For the meaning of 'personal representative' see *ibid* s 272; and INHERITANCE TAXATION vol 24 (Reissue) PARA 432. The personal representative is liable for the inheritance tax on the value transferred by a chargeable transfer made on the death of any person so far as the tax is attributable to the value of property which either: (1) was not immediately before the death comprised in a settlement; or (2) was so comprised and consists of land in the United Kingdom which devolves or vests in him: see s 200(1); and INHERITANCE TAXATION vol 24 (Reissue) PARA 644. For these purposes a person who takes possession of or intermeddles with, or otherwise acts in relation to, property so as to become liable as executor or trustee, and any person to whom the management of property is entrusted on behalf of a person not of full legal capacity is treated as a person in whom the property is vested: see ss 199(4), 200(4); and INHERITANCE TAXATION vol 24 (Reissue) PARA 634. For the meaning of 'United Kingdom' see PARA 18 note 4 ante.

5 The tax and any interest on it will be payable out of the assets of the estate in the order of priority prescribed by the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II (as amended): see PARA 410 et seq ante.

6 See the Inheritance Tax Act 1984 s 211(1)(a); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

7 See *ibid* s 211(1)(b); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

8 See *ibid* s 211(3); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

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547. Free of duty provisions.

A testator may by his will effectually alter the normal rules for the incidence of inheritance tax¹ and may thus prescribe the manner in which as between the beneficiaries any duties are to be borne². A testator's intention to exonerate parts of his estate from the liability to inheritance tax³ which they would otherwise bear must be inferred as a matter of construction⁴ from the terms of the will.

So far as any provision in any document, whenever executed, refers (in whatever terms) to estate duty or death duties it is to have effect, as far as may be, as if the reference included a reference to inheritance tax⁵. In the following paragraphs notes of cases referring to estate duty and other duties are included as they may be of assistance in construing testamentary instruments containing gifts free of tax.

1 As to the burden of inheritance tax on death see PARA 546 ante.

2 See the Inheritance Tax Act 1984 s 211(2); and INHERITANCE TAXATION vol 24 (Reissue) PARA 651. See also PARA 546 ante.

3 On the construction of the particular will 'duty' may refer only to legacy duty: see eg *Re McNeill, Royal Bank of Scotland v MacPherson* [1958] Ch 259, [1957] 3 All ER 508, CA.

4 *Gude v Mumford* (1837) 2 Y & C Ex 445. As to the normal rules of construction see WILLS vol 50 (2005 Reissue) PARA 476 et seq.

5 See the Inheritance Tax Act 1984 s 273, Sch 6 para 1. See also the Finance Act 1986 s 100; and INHERITANCE TAXATION vol 24 (Reissue) PARAS 402-403.

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548. Presumptions.

Wills commonly provide that specified dispositions of property are to be free of tax or that tax and duties generally are to be paid out of a specified fund. The cases all refer to 'duty' and not to 'tax' but may nonetheless be of assistance in construing testamentary instruments made free of tax.

Where the will creates a life interest it may also make provision for the payment of the further tax payable on the death of the tenant for life but there is a strong presumption to the contrary¹. Complications also arise as to whether a testator intended by his will to affect additional taxes imposed by statute after his death relating to the death of a life tenant².

There is a presumption that a testator intends to provide only for such taxes as are payable on his death³.

A reference to tax will normally be construed as a reference to tax payable only on dispositions made by the will⁴ and payable under English law and not to duty payable under foreign law⁵, unless, as in the case of foreign immovables, only foreign taxes are payable⁶. A clause in the will exonerating from tax dispositions contained in the will will normally⁷ but not necessarily⁸ be construed as extending to similar dispositions or variations⁹ made by codicil¹⁰ or by the testamentary exercise of a special power of appointment¹¹.

An intention that a legacy should be tax-free cannot be implied from the fact that if tax were deducted the sum left would not be sufficient for some purpose specified in the will¹². It has also been held that a direction for payment of duty on gifts made during the testator's lifetime cannot extend to amorphous rights in a joint account¹³, nor will a specific devise be exonerated unless the will in effect gives the devisee an additional legacy of the tax in question¹⁴.

Subject to the presumption stated above, each will must be construed by the normal canons, and no general statement of the meaning of particular words in other wills is conclusive¹⁵.

1 *Re Wedgwood, Allen v Public Trustee* [1921] 1 Ch 601, CA; *Re Laidlaw, Wilkinson v Lyde* [1930] 2 Ch 392 at 396; *Re Shepherd, Public Trustee v Henderson* [1949] Ch 116, [1948] 2 All ER 932; *Re Howell, Drury v Fletcher* [1952] Ch 264, [1952] 1 All ER 363. See also *Re Palmer, Palmer v Palmer* [1916] 2 Ch 391 at 401, CA; *Re Paterson's Will Trusts, Lawson v Page* [1963] 1 All ER 114, [1963] 1 WLR 623; *Re Embleton's Will Trusts, Sodeau v Nelson* [1965] 1 All ER 771, [1965] 1 WLR 840.

2 In the following cases the expressions used in wills made before the passing of the Finance Act 1914, which abolished certain relief in respect of settled property (see s 14 (repealed); and INHERITANCE TAXATION vol 24 (Reissue) PARA 401), were held to cover the estate duty chargeable on a death subsequent to that of the testator: *Re Brown, Turnbull v Royal National Lifeboat Institution* (1916) 60 Sol Jo 353 ('every bequest to be free and clear of duties', the expression being contrasted with the terms of another gift by the will to A for life and then 'subject to any duty' to B); *Re Hatch, Hatch v Hatch* (1916) 115 LT 472 (direction to pay the 'duties payable in respect of all and every the benefits given by this my will'); *Re Stoddart, Bird v Grainger* [1916] 2 Ch 444 ('legacies (whether settled or otherwise) ... to be paid and enjoyed free of all death duties', with a direction to the trustee 'to pay or provide for ... the duties thereon'); *Re Tinkler, Loyd v Allen* [1917] 1 Ch 242 ('all duties payable in respect of the said sum ... shall be paid out of and be a charge upon my residuary estate'); *Re Eve, Hall v Eve* [1917] 1 Ch 562 ('all the foregoing gifts, bequests, and legacies shall be free of duty,' the words 'gifts', etc being construed as applying to the successive beneficial interests); *Dunn's Trustees v Dunn* 1924 SC 613 ('free of legacy or other duty'). Cf *Re Lomer, Public Trustee v Victoria Hospital for Children* [1929] 1 Ch 731 (legacies payable, after deaths of life tenants, in a certain order of 'priority'; the earlier legacies held to be payable in full so that the estate duty would fall on the later legacies).

In the following cases the expressions used in wills made before the Finance Act 1914 were held not to cover the estate duty chargeable on a death subsequent to that of the testator: *Re Snape, Elam v Phillips* [1915] 2 Ch 179 ('free of all duty'); *Re Palmer, Palmer v Palmer* [1916] 2 Ch 391, CA (legacies to be 'handed over or paid free of all duties or deductions in respect of duties (other than income tax)' and trustees to 'make provision' for duties); *Re Gunn, Harvey v Gunn* [1916] WN 283 (direction to pay the estate duty 'in respect of my estate or any part thereof'); *Re D'Oyly, Vertue v D'Oyly* [1917] 1 Ch 556 ('free of duty', with a direction to pay 'the duties on the ... legacies'); *Re Wedgwood, Allen v Public Trustee* [1921] 1 Ch 601, CA ('free of all death duties', with a direction to 'pay and provide for ... the duties'); *Re Duke of Sutherland, Chaplin v Leveson-Gower* [1922] 2 Ch 782 ('all the legacies and annuities and all other gifts, bequests, and devises' to be 'free from all death duties'); *Re Fenwick, Lloyds Bank Ltd v Fenwick* [1922] 2 Ch 775 (provision for payment of 'all duties of every description ... to which my estate ... shall be liable'); *Re Sarson, Public Trustee v Sarson* [1925] Ch 31 (direction that 'all legacies, devises and bequests shall be free of all duties, and that all estate, settlement, succession, legacy and other duties, in respect of any of my property ... shall be paid out of my residuary estate'); *Re Laidlaw, Wilkinson v Lyde* [1930] 2 Ch 392 (legacies to be 'satisfied paid and enjoyed free of death duties').

In the following cases the expressions used in wills made after the passing of the Finance Act 1914 were held to cover the estate duty chargeable on a death subsequent to that of the testator: *Re Parker, White v Stewart* (1917) 86 LJ Ch 766, CA ('free of ... settlement estate duty and all other death duties'); *Re Northcliffe, Arnholz v Hudson* [1929] 1 Ch 327 (every benefit given by the will to be 'free of all death duties whatsoever').

In the following cases the expressions used, in wills made after the passing of the Finance Act 1914, were held not to cover the estate duty chargeable on a death subsequent to that of the testator: *Re Beecham, Woolley v Beecham* (1923) 130 LT 558, CA (direction to pay 'all death duties of every kind on every part of my estate ... so that this direction shall operate to exonerate any part of my estate which otherwise would or might be charged with or liable for any death duties'); *Re Jones, Lambert v Colbourn* [1928] WN 227 at 228 (direction to pay 'all duties ... incidental to the execution of the trusts'); *Re Trimble, Wilson v Turton* [1931] 1 Ch 369 ('free of all duties'); *Re Hicks, Bach v Cockburn* [1933] 1 Ch 335 ('free from all death duties ... whether presently or presumptively or prospectively payable', the words having been taken from a pre-1914 precedent).

3 See the cases cited in note 1 supra.

4 See *Re Walley, National Westminster Bank Ltd v Williams* [1972] 1 All ER 222, [1972] 1 WLR 257, where in exceptional circumstances the phrase 'funeral and testamentary expenses and debts and all death duties' was held to extend to gifts which only became fully effective on the death, although not to other gifts inter vivos. See also PARA 435 ante; and *Re Hudson, Spencer v Turner* [1911] 1 Ch 206, not cited in *Re Walley, National Westminster Bank Ltd v Williams* supra.

5 *Re Norbury, Norbury v Fanland* [1939] Ch 528, [1939] 2 All ER 625; *Re Cunliffe-Owen, Mountain v Comber* [1951] Ch 964, [1951] 2 All ER 220; *Re Goetze, National Provincial Bank Ltd v Mond* [1953] Ch 96, [1953] 1 All ER 76; *Re Blake, Lynch v Lombard* [1955] IR 89; *Re Sebba, Lloyds Bank Ltd v Hutson* [1959] Ch 166, [1958] 3 All ER 393. As to the right of legatees to share in credits allowed under a double taxation relief agreement see *Re Goetze, National Provincial Bank Ltd v Mond* supra; and INHERITANCE TAXATION vol 24 (Reissue) PARAS 611-613.

6 *Re Quirk, Public Trustee v Quirk* [1941] Ch 46.

7 *Byne v Currey* (1834) 2 Cr & M 603; *M'Alpine v Studholme* (1883) 10 R 837, Ct of Sess; *Re Sealy, Tomkins v Tucker* (1901) 85 LT 451.

8 *Re King, Barclays Bank Ltd v King* [1942] Ch 413, [1942] 2 All ER 182, CA; *Early v Benbow* (1846) 2 Coll 342; *Early v Benbow* (1846) 2 Coll 354; *Brown's Trustees v Gow* (1902) 5 F 127, Ct of Sess; but cf *Williams v Hughes* (1857) 24 Beav 474 at 482.

9 *Fisher v Brierley (No 2)* (1861) 30 Beav 267.

10 Similarly a direction in a codicil will apply to dispositions in a later codicil: *Re Dresden, Lindo v London Hospital* (1910) Times, 22 July. Where a legacy or annuity is given by will free of duty, and, by a codicil, another legacy or annuity is substituted for it, the latter gift is to be paid free of duty (*Cooper v Day* (1817) 3 Mer 154; *Earl of Shaftesbury v Duke of Marlborough* (1835) 7 Sim 237; *Re Trinder, Sheppard v Prance* (1911) 56 Sol Jo 74), but not where the gift is to a different legatee by reason of the death of the legatee named in the will (*Chatteris v Young* (1827) 2 Russ 183) or where, although the gift is primarily to the same legatee, its character has been so altered that it is to be regarded as a separate and distinct gift (*Burrows v Cottrell* (1830) 3 Sim 375), as for example where a settled legacy is given in place of an absolute legacy (*Re Trinder, Sheppard v Prance* supra).

11 *Re Edwards, Lloyds Bank Ltd v Worthington* [1946] 2 All ER 408; *Re Marquis of Bath's Settlement, Thynne v Stewart* (1914) 111 LT 153; *Muir (or Williams) v Muir* [1943] AC 468 at 483, HL. Testamentary expenses do not include estate duty on property appointed by will under a general power of appointment: *O'Grady v Wilmot* [1916] 2 AC 231, HL.

12 *Re De Rosaz, Rymer v De Rosaz* (1886) 2 TLR 871.

13 *Re Figgis, Roberts v MacLaren* [1969] 1 Ch 123 at 150, [1968] 1 All ER 999 at 1014 per Megarry J.

14 *Re Phuler's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Logan* [1964] 2 All ER 948, [1965] 1 WLR 68; *Re Neeld, Carpenter v Inigo-Jones* [1964] 2 All ER 952n, [1965] 1 WLR 73n, CA. See also *Re Williams, Williams and Glyn's Trust Co Ltd v Williams* [1974] 1 All ER 787, [1974] 1 WLR 754.

15 As to the normal rules of construction see WILLS vol 50 (2005 Reissue) PARA 513 et seq.

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549. Words affecting the incidence of duty.

In particular cases the following words or phrases have been construed as affecting the incidence of duty: 'without any deduction whatsoever except in respect of income tax'; 'free from all taxes and deductions except property tax and legacy or succession duty'; 'my ...

duties³; 'clear amount or value'⁴; 'all expenses ... including the estate duty'⁵; 'clear money'⁶; 'free of any incumbrances'⁷; 'clear of all charges and outgoings'⁸; 'clear of property tax and all expenses whatsoever attending the same'⁹; 'free from all expense'¹⁰; 'to be paid clear'¹¹; 'free from any charge or liability in respect thereof'¹²; 'free of all outgoings and payments except the annual and other rent'¹³; 'clear value'¹⁴; 'net sum'¹⁵; and 'free of duty'¹⁶.

1 *Re Parker-Jervis, Salt v Locker* [1898] 2 Ch 643. For similar wording see also *Re Maryon-Wilson, Wilson v Maryon-Wilson* [1900] 1 Ch 565, CA; *Smith v Anderson* (1828) 4 Russ 352; *Re Rayer, Rayer v Rayer* [1903] 1 Ch 685; *Floyer v Bankes* (1863) 3 De GJ & Sm 306; *Barksdale v Gilliat* (1818) 1 Swan 562; *Ferguson v Ogilby* (1862) 12 I Ch R 411; *Re Smith-Bosanquet, Smith v Smith-Bosanquet* [1940] Ch 954, [1940] 3 All ER 519.

2 *Re Lord Fitzhardinge, Lord Fitzhardinge v Jenkinson* (1899) 80 LT 376, CA; *Re Previté, Sturges v Previté* [1931] 1 Ch 447; *Re Lonsdale Will Trusts, Lowther v Lowther* [1960] Ch 288 at 308, [1959] 3 All ER 679 at 689, CA, per Lord Evershed MR. The same result follows where the words are simply 'free from all deductions': *Re Earl of Egmont's Settled Estates, Lefroy v Egmont* [1912] 1 Ch 251. Where a testator bequeathed a sum to make up, with the income of a settled fund, 'a clear annual income' of £1,500, without 'deduction ... for the legacy tax or any other matter, cause, or thing' it seems that the annuitant was entitled to be indemnified out of the testator's estate against succession duty under the settlement (*Pearreth v Marriott* (1882) 22 ChD 182, CA), but where the deceased covenanted to pay during his life or within 12 months of his death a certain sum, 'free from all deductions whatsoever', and the sum was paid by his executor, the covenantees could not recover from the executor the succession duty payable by them (*Re Higgins, Day v Turnell* (1885) 31 ChD 142, CA; *Re Williams, Williams and Glyn's Trust Co Ltd v Williams* [1974] 1 All ER 787, [1974] 1 WLR 754).

3 *Re Pimm, Sharpe v Hodgson* [1904] 2 Ch 345, distinguished in *Re Briggs, Richardson v Bantoft* [1914] 2 Ch 413. See also PARA 551 note 1 post.

4 *Re Coxwell's Trusts, Kinloch-Cooke v Public Trustee* [1910] 1 Ch 63. The word 'net' has been construed as meaning 'clear': *Re Saunders, Saunders v Gore* [1898] 1 Ch 17, CA.

5 These words were held to cover additional estate duty, imposed by an Act passed after the testator's death: *Re Briscoe, Royds v Briscoe* (1910) 55 Sol Jo 93. See also *Re Palmer, Palmer v Palmer* [1916] 2 Ch 391, CA; *Re Walley, National Westminster Bank Ltd v Williams* [1972] 1 All ER 222, [1972] 1 WLR 257. See also PARA 548 note 4 ante.

6 *Re Palmer, Leventhorpe v Palmer* (1912) 106 LT 319, CA.

7 *Re Nesfield, Barber v Cooper* (1914) 110 LT 970.

8 *Re Earl Cadogan Settlements, Richmond v Lambton* (1911) 56 Sol Jo 11.

9 *Courtoy v Vincent* (1823) Turn & R 433.

10 *Gosden v Dotterill* (1832) 1 My & K 56 at 60.

11 *Ford v Ruxton* (1844) 1 Coll 403.

12 *Warbrick v Varley* (1861) 30 Beav 241.

13 *Re Taber, Arnold v Kayess* (1882) 46 LT 805.

14 *Re Currie, Bjorkman v Lord Kimberley* (1888) 57 LJ Ch 743.

15 *Re Grant, Nevinson v United Kingdom Temperance and General Provident Institution* (1915) 85 LJ Ch 31.

16 *Re Dawson's Will Trusts, National Provincial Bank Ltd v National Council of the YMCA Inc* [1957] 1 All ER 177, [1957] 1 WLR 391. This direction was held to include an inter vivos gift.

550. Words which do not affect the incidence of duty.

In the following cases the expressions used did not affect the incidence of the duty: 'necessary expenses'¹; 'cash value of £6,000'²; a direction to raise probate duty which was held not to apply to estate duty³; 'testamentary expenses'⁴; and 'all death duties'⁵.

An appointment under a power of the sum required to provide for death duties on a specific property carries only the sum appointed, the duty on the appointed sum being payable out of it⁶.

A direction contained in a will made after the abolition of legacy duty⁷ that the duty on pecuniary legacies was to be paid by the legatees was construed as inserted under a misapprehension as to the continued existence of legacy duty or similar duty, and not intended to render the legatees liable to pay a proportionate part of estate duty⁸.

1 *Michie's Executors v Michie* (1905) 7 F 509, Ct of Sess. In the following cases also the expressions used were held not to affect the incidence of estate duty: *Re Baxter, Baxter v Baxter* (1898) 42 Sol Jo 611 (direction to pay 'all estate and other duties' held not to cover a gift inter vivos); *Berry v Gaukroger* [1903] 2 Ch 116, CA ('legacy' payable in part out of real estate); *Michie's Executors v Michie* supra ('necessary expenses' in a Scottish will); *Kekewich v Kekewich* (1909) 101 LT 887 ('cash value of £6,000'); *Re Boxer, Morris v Woore* [1910] 2 Ch 69 (direction to raise probate duty held not to apply to estate duty); *Re Briggs, Richardson v Bantoft* [1914] 2 Ch 413 (direction to pay 'all death duties' held not to cover a sum covenanted to be paid to trustees and secured on the testator's real estate), distinguishing *Re Pimm, Sharpe v Hodgson* [1904] 2 Ch 345; *Re Brown, Turnbull v Royal National Lifeboat Institution* (1916) 60 Sol Jo 353 (bequests of personalty 'subject to any duty' not required to bear any estate duty); cf *Fraser v Croft* (1898) 25 R 496, Ct of Sess (power for life interest of heritable property, who was also sole residuary legatee, to 'raise such sums as may be required to pay all death and succession duties which may fall upon her' did not entitle her to throw upon the heritage the estate duty in respect of the movable property).

2 *Kekewich v Kekewich* (1909) 101 LT 887.

3 *Re Boxer, Morris v Woore* [1910] 2 Ch 69.

4 Death duties which, by virtue of the fact that the property does not pass to the executor as such, are a first charge on the property are not testamentary expenses: *Re Jolley, Neal v Jolley* (1901) 17 TLR 244; *Re Sharman, Wright v Sharman* [1901] 2 Ch 280; *Re Spencer-Cooper, Poë v Spencer-Cooper* [1908] 1 Ch 130; *Re Rosenthal, Schwarz v Bernstein* [1972] 3 All ER 552, [1972] 1 WLR 1273 (trustees who paid out of residue estate duty on a specifically devised house risked personal liability if they could not recover the duty from the devisee). See also PARA 793 post; and INHERITANCE TAXATION vol 24 (Reissue) PARA 645. It has been held that 'testamentary expenses, including death duties' include only such estate duty as is normally a testamentary expense: *Re Massey, Ram v Massey* (1920) 122 LT 676. The incorporation of the Statutory Will Forms 1925, SR & O 1925/780, Form 8, does not alter the incidence of duty on real estate: *Re Previté, Sturges v Previté* [1931] 1 Ch 447.

Certain objects of national etc interest were subject to exemption from estate duty until sale, under the Finance Act 1930 s 4 (repealed), and are now exempt from inheritance tax under certain circumstances: see the Inheritance Tax Act 1984 ss 30, 31 (both as amended); and INHERITANCE TAXATION vol 24 (Reissue) PARA 535 et seq. As to the application of 'free of duty' provisions to such objects see *Re Lord Leconfield, Wyndham v Lord Leconfield* (1904) 90 LT 399, CA; *Re Lord Swaythling, Samuel v Swaythling* (1912) 29 TLR 88; *Re Scott, Scott v Scott* [1916] 2 Ch 268, CA (applied in *Re Oppenheimer, Tyser v Oppenheimer* [1948] Ch 721; *Re Bedford, Russell v Bedford* [1960] 3 All ER 756, [1960] 1 WLR 1331).

5 *Re Phuler's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Logan* [1964] 2 All ER 948, [1965] 1 WLR 68; *Re Neeld, Carpenter v Inigo-Jones* [1964] 2 All ER 952n, [1965] 1 WLR 73n, CA (if the testator has already made a distinction between gifts free of duty and gifts not free of duty even the word 'all' may refer only to the gifts made free of duty).

6 *Re Constantine, Willan v Constantine* (1926) 70th Report of Inland Revenue Commissioners (Cmd 2989) 13.

7 See PARA 552 post.

8 *Re Rumball, Sherlock v Allan* [1956] Ch 105, [1955] 3 All ER 71, CA.

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551. Annuities.

In the case of an annuity the following expressions have affected the burden of duty: 'clear of all deductions'¹; 'clear of all taxes and outgoings'²; 'without any deduction or abatement out of the same'³; 'clear of all taxes and deductions whatsoever'⁴; 'one annuity or clear yearly sum'⁵; 'free yearly annuity'⁶; 'tax free and without any deduction'⁷.

1 *Dawkins v Tatham* (1829) 2 Sim 492; *Re Coles' Will* (1869) LR 8 Eq 271.

2 *Louch v Peters* (1834) 1 My & K 489.

3 *Smith v Anderson* (1828) 4 Russ 352.

4 *Stow v Davenport* (1833) 5 B & Ad 359 at 366.

5 *Gude v Mumford* (1837) 2 Y & C Ex 445; *Re Dyet, Morgan v Dyet* (1902) 87 LT 744.

6 *Bulloch v Beaton* (1853) 15 Durl 373, Ct of Sess. For similar wording see also *Wilks v Groom* (1856) 4 WR 697; *Baily v Boulton* (1851) 14 Beav 595; *Haynes v Haynes* (1853) 3 De GM & G 590; *Re Robins, Nelson v Robins* (1888) 58 LT 382.

7 *Re Lord Fermoy* (1890) MacCarthy's Leading Cases in Land Purchase Law 55. See also *Re Cayley, Awdry v Cayley* [1904] 2 Ch 781 (direction to pay 'the death duties payable out of my estate'), distinguishing *Re Lewis, Lewis v Smith* [1900] 2 Ch 176; *Re Turnbull, Skipper v Wade* [1905] 1 Ch 726 ('free from duty'); *Re Waller, Margarison v Waller* [1916] 1 Ch 153 ('net income'). In the following cases the expressions used were held not to affect the incidence of settlement estate duty: *Re Lewis, Lewis v Smith* supra (direction to pay 'all duties payable by law out of my estate'); *Dundas's Trustees v Dundas's Trustees* 1912 SC 375 (covenant to pay a sum which would with other funds 'make up the sum of £30,000').

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552. Legacy duty.

Many cases are to be found on the question whether particular legacies were given free of duty. Legacy duty has now been completely abolished¹, but some of these cases are mentioned in the following paragraph as they may be of assistance in construing testamentary instruments making gifts free of duty.

The gift of the legacy duty payable on a specific or pecuniary legacy was itself a pecuniary legacy², and where there was a deficiency it abated accordingly³.

1 See the Finance Act 1949 s 27 (repealed); the Finance Act 1975 s 50(1)(c); and INHERITANCE TAXATION vol 24 (Reissue) PARA 401. The further legacy duty imposed by the Finance Act 1947 s 49 (repealed) merely raised the rate, and was covered by a direction to pay legacy duty out of residue, even where the testator had died before it was imposed: *Re Shepherd, Public Trustee v Henderson* [1949] Ch 116, [1948] 2 All ER 932.

2 See the Administration of Estates Act 1925 s 55(1)(ix): and PARA 421 ante.

3 *Farrer v St Catharine's College, Cambridge* (1873) LR 16 Eq 19 at 25. Where there is in fact no residue, the legatee had to bear the legacy duty to the extent to which the estate was insufficient to provide it: *Wilson v O'Leary* (1874) LR 17 Eq 419. The legacy duty was to be added to the legacy for the purpose of abatement, and the abated legacy was to bear its own duty: *Lord Advocate v Taylor* (1884) 21 SLR 709; *Re Turnbull, Skipper v Wade* [1905] 1 Ch 726. See also *Re Wilkins, Wilkins v Rotherham* (1884) 27 ChD 703, followed in principle, but disapproved in arithmetic, in *Re Turnbull, Skipper v Wade* supra at 730 per Farwell J. As to abatement see PARA 506 ante.

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553. Words affecting the incidence of legacy duty.

In the following cases legacy duty was affected by the words used. The words 'all free of legacy duty' in the margin of a will applied to all the legacies in the will and not only those opposite which the words were written¹. The word 'clear' normally meant free of legacy duty²; and where a legacy was added to a legacy free of duty the added legacy was also free³. Where a devise was free of duty it might also be free not only of estate duty and succession duty but also of legacy duty on sums applied in payment of other duties⁴. A direction to 'pay' legacies free of duty might include stock⁵ and specific articles⁶; and a direction to pay pecuniary legacies free of duty was held to include the forgiveness of a debt⁷ and an annuity⁸. A direction to pay all legacies free of duty was held to include a freehold house passing under a gift referring to any house in the testator's occupation (which might have included a leasehold house⁹); and a direction to pay all legacies, annuities and bequests free of all death duties was held to include a life interest in residue¹⁰. The duty on a moiety of residue given free of duty might be payable out of a lapsed¹¹ and possibly even a non-lapsed moiety¹². An explicit direction to pay one legacy free of duty did not necessarily affect a more general implied direction to pay other legacies¹³ or an annuity¹⁴ free of duty.

Cases in which legacy duty was unaffected by the words used include the following. A direction to pay all duties related prima facie only to legacies given expressly free of duty¹⁵. A gift of six months' 'full' salary was held not to be free of legacy duty¹⁶, nor was a gift of legacies followed by a direction for their 'full' payment and satisfaction out of the residue of a settled fund¹⁷. A direction to discharge a person's debts did not imply that they were to be paid free of duty¹⁸; and a direction to pay all death duties included only estate duty and not legacy duty¹⁹. In a case where life annuities were given free of duty and other beneficiaries were appointed 'heirs' to them it was held that these beneficiaries did not take free of duty²⁰. A direction to pay pecuniary legacies free of duty did not apply to a gift of stock²¹ or a direction to pay 'sums' of money free of duty to shares²². The produce of the sale of real estate was not exonerated from duty by a direction that 'legacies and bequests' should be free of duty²³; nor was a life interest in residue exonerated by a direction to pay out of residue legacy duty on all 'annuities and pecuniary legacies'²⁴. If a share of residue was added to an exonerated legacy the share was not exonerated²⁵.

1 *Bedford v Kirkpatrick* (1878) 4 App Cas 96, HL.

2 The following cases may be of assistance on the effect given to the use of phrases including the word 'clear': 'clear of legacy duty and all other deductions', legacy duty being payable at the same rate in respect of persons interested in succession (*Calvert v Sebban* (1838) 2 Keen 672); 'clear yearly sum' (*Harper v Morley* (1838) 2 Jur 653); or with the added direction 'clear of all deductions whatsoever' (*Marris v Burton* (1840) 11 Sim 161, explained in *Baily v Boulton* (1851) 14 Beav 595 at 596-597 per Romilly MR). It has been held that a gift

of the income of a capital sum sufficient to realise a clear yearly income of a stated amount was not a gift free from legacy duty (*Banks v Braithwaite* (1862) 32 LJ Ch 35, disapproved in *Re Saunders, Saunders v Gore* [1898] 1 Ch 17, CA); although it was otherwise where the gift was to pay 'such income or yearly sum' which the capital sum was to be sufficient to realise (*Re Coles' Will* (1869) LR 8 Eq 271).

3 *Johnstone v Earl of Harrowby* (1859) 1 De GF & J 183 at 192; but cf note 25 infra. The principle did not apply where the nature of the gifts was entirely different: *Re Howe, Wilkinson v Ferniehough* (1910) 103 LT 185.

4 *Re King, Barclays Bank Ltd v King* [1942] Ch 413, [1942] 2 All ER 182, CA.

5 *Ansley v Cotton* (1846) 16 LJ Ch 55.

6 *Re Johnston, Cockerell v Earl of Essex* (1884) 26 ChD 538 at 554; *Re Dresden, Lindo v London Hospital* (1910) Times, 22 July.

7 *Morris v Livie* (1842) 11 LJ Ch 172 at 173.

8 *Pearse v Pearse* (1853) 2 WR 129. Where a gift of an annuity simpliciter was followed by a direction to set aside capital 'sufficient to answer by means of the net income' inter alia the annuity in question, the direction (which, had it stood alone, would have made the annuity free of duty) was regarded in the circumstances as mere machinery which did not enlarge the original gift: *Re Waller, Margarison v Waller* [1916] 1 Ch 153.

9 *Re Previté, Sturges v Previté* [1931] 1 Ch 447.

10 *Re Kennedy, Corbould v Kennedy* [1917] 1 Ch 9, CA (therefore duty is paid out of corpus and not out of income). See, however, the text to note 24 infra.

11 *Warbrick v Varley* (1861) 30 Beav 241.

12 *Re Dalrymple, Bircham v Springfield* (1901) 49 WR 627.

13 *Warbrick v Varley* (1861) 30 Beav 241.

14 *Re Robins, Nelson v Robins* (1888) 58 LT 382.

15 *Re Baxter* (1914) 136 LT Jo 480. Cf para 550 note 5 ante.

16 *Re Marcus, Marcus v Marcus* (1887) 56 LJ Ch 830.

17 *Re Townend, Knowles v Jessop* [1914] WN 145.

18 *Foster v Ley* (1835) 2 Bing NC 269.

19 *Re Borough, Public Trustee v Roberts-Gawen* [1938] 1 All ER 375. For a converse case see *Re McNeill, Royal Bank of Scotland v MacPherson* [1958] Ch 259, [1957] 3 All ER 508, CA.

20 *Urquhart's Trustees v Urquhart* (1900) 3 F 242, Ct of Sess.

21 *Douglas v Congreve* (1836) 1 Keen 410 at 424.

22 *Dakers v Lilburn* (1865) 12 LT 167; but see the text to note 5 supra.

23 *White v Lake* (1868) LR 6 Eq 188.

24 *Lord Londesborough v Somerville* (1854) 19 Beav 295 at 301; *Re Tanqueray, Sewell v Woodfield* [1924] WN 42; *Re Northcliffe, Arnholz v Hudson* [1929] 1 Ch 327; but cf the text to note 10 supra.

25 *Macdonald's Trustees v Aberdeen Corp'n* (1902) 39 SLR 745 at 746; but cf note 3 supra.

554. Succession duty.

Many cases are also to be found relating to succession duty which has also been completely abolished¹. These cases may also be of assistance in construing testamentary instruments².

¹ See the Finance Act 1949 s 27 (repealed); Finance Act 1975 s 50(1)(c).

² A direction in a will that all legacies were to be 'paid' free of legacy duty did not cover succession duty in respect of a specific bequest of leaseholds (*Re Johnston, Cockerell v Earl of Essex* (1884) 26 ChD 538), or in respect of a specific devise of real estate (*Ellard v Phelan* [1914] 1 IR 76); but a direction that 'all legacies' were to be free of duties has been held to cover a freehold house passing under a gift in general terms of any house in the testator's occupation, which might have comprised a leasehold house (*Re Previté, Sturges v Previté* [1931] 1 Ch 447). Where legacies were made payable 'free of legacy duty', partly out of the proceeds of sale of real estate, with a further direction that 'the duties on the said legacies' were to be paid out of residue, they were free of succession duty as well as legacy duty (*Re Palmer, Leventhorpe v Palmer* (1912) 106 LT 319, CA); and a general direction to pay death duties out of residue would exonerate real estate specifically devised, notwithstanding that earlier in the will various legacies were given expressly free of legacy duty, the earlier provision being treated as redundant and not cutting down the meaning of 'death duties' (*Re Hampton, Hampton v Mawer* (1918) 62 Sol Jo 585); but a direction to pay 'testamentary expenses, including death duties' out of residue related only to the duty which was normally a testamentary expense, ie the estate duty on the personal estate (*Re Massey, Ram v Massey* (1920) 122 LT 676); and where an annuity was charged by a will on real estate and bequeathed 'without any deductions except for legacy duty and income tax', it was held on the special facts of the case that the testator intended the annuitant to bear the succession duty, which duty, and not legacy duty, was actually payable (*Re Rayer, Rayer v Rayer* [1903] 1 Ch 685).

A direction by a testator to pay out of a particular fund the succession duty payable 'in consequence of his death covered the succession duty on property of which he was tenant for life (*Earl of Poulett v Hood* (1866) 35 Beav 234); but a similar direction to pay the succession duty payable 'upon' the death in respect of specified settled estates covered the duty in respect of any money to arise from sales of timber on such estates (*Re Lord Leconfield, Wyndham v Lord Leconfield* (1904) 90 LT 399, CA, distinguished in *Re Scott, Scott v Scott* [1916] 2 Ch 268, CA). A direction in a will to pay 'all death duties' refers prima facie only to duties to which the estate becomes liable under the dispositions in the will, and did not include the succession duty on a sum due under the testator's covenant to the trustees of his daughter's marriage settlement: *Re Briggs, Richardson v Bantoft* [1914] 2 Ch 413. A direction to pay out of residue all legacy and succession duty on 'legacies' and 'annuities' did not cover the succession duty in respect of a life interest in real estate: *Re King's Trusts* (1892) LR 29 Ir 401.

Directions in wills to pay 'all ... succession or other duties payable in respect of all and every the benefits given by this my will' (*Re Hatch, Hatch v Hatch* (1916) 115 LT 472), and that all bequests shall be free of succession duty and all other death duties (*Re Parker, White v Stewart* (1917) 86 LJ Ch 766, CA), have been held to extend to succession duty payable on the deaths of life tenants under the wills. Where, however, property was devised 'free of all death duties' on trusts for certain persons for their lives with remainders over, and the will contained a direction to pay 'legacy, succession and other duties' out of residue, it was held that the directions did not apply to succession duty presumptively payable on the deaths of life tenants (*Re Trimble, Wilson v Turton* [1931] 1 Ch 369), the decisions as to legacy duty in analogous cases not being followed, on the ground, inter alia, that future legacy duty would, while future succession duty would not, be payable by the executors as distinguished from trustees. See, however, *Re Jones' Trust* (1852) 21 LJ Ch 566.

A direction to pay out of the capital of the testator's estate all his just debts, funeral and testamentary expenses, and also all succession duties and inheritance and estate and death taxes that might be payable in connection with any gift or benefit given by him by his will was held to exonerate the pecuniary legatees at the expense of residue given to four charities: *Re Valens, Canada Permanent Trust Co and Crockett v Wa-Wa Temple of Mystic Shrine* [1973] 5 WWR 161.

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THE DISTRIBUTION OF ASSETS/(4) THE RESIDUARY ESTATE ON INTESTACY/555. Trusts on intestacy.

(4) THE RESIDUARY ESTATE ON INTESTACY

555. Trusts on intestacy.

On the death of a person intestate¹ after 31 December 1925² as to any real or personal estate, that estate is held in trust by his personal representatives with the power to sell it³.

The personal representatives must pay out of the ready money of the deceased (so far as not disposed of by his will, if any⁴) and any net money arising from disposing of any other part of his estate (after payment of costs⁵) all such funeral⁶, testamentary and administration expenses⁷, debts and other liabilities as are properly payable out of it⁸. From the residue the personal representative must set aside a fund sufficient to provide for any pecuniary legacies⁹ bequeathed by the deceased's will, if any¹⁰.

1 'Intestate' includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate: Administration of Estates Act 1925 s 55(1)(vi). Where the deceased leaves a will, s 33 (as amended) has effect subject to the provisions contained in the will: s 33(7). As to the respective application to cases of partial intestacy of s 33 (as amended) and s 49 (as amended) see PARA 617 post.

2 These provisions apply only to deaths after 31 December 1925: Administration of Estates Act 1925 s 54.

3 Ibid s 33(1) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 5(2)). For the meaning of 'real estate' see PARA 3 note 1 ante.

4 Administration of Estates Act 1925 s 33(2)(a) (s 33(2) amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 2 para 5(3)).

5 Administration of Estates Act 1925 s 33(2)(b) (as amended: see note 4 supra).

6 As to funeral expenses see CREMATION AND BURIAL.

7 As to testamentary and administration expenses see PARA 432 et seq ante.

8 Administration of Estates Act 1925 s 33(2) (as amended: see note 4 supra).

9 For the meaning of 'pecuniary legacy' for this purpose see PARA 421 ante.

10 Administration of Estates Act 1925 s 33(2) (as amended: see note 4 supra). Nothing in s 33 (as amended) affects the rights of any creditor of the deceased (as to which see PARA 384 et seq ante) or the rights of the Crown in respect of death duties: s 33(6). As to the incidence of death duties see PARAS 546-554 ante.

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556. Powers of investment.

During the minority of any beneficiary or the subsistence of any life interest, and pending the distribution of the whole or any part of the deceased's estate, the personal representatives¹ may invest the residue of the money, or so much of it as may not have been distributed, in any investment for the time being authorised by statute for the investment of trust money², with power, at their discretion, to change those investments for others of a like nature³.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 As to the investment of trust money see the Trustee Investments Act 1961; and TRUSTS vol 48 (2007 Reissue) PARA 1005 et seq.

3 Administration of Estates Act 1925 s 33(3). Personal representatives in such a case often execute an assent to themselves upon trust for sale (now trust of land: see REAL PROPERTY vol 39(2) (Reissue) PARA 66) as suggested in *Re Yerburch*, *Yerburch v Yerburch* [1928] WN 208. As to assents see PARA 559 et seq post.

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557. Distribution of residuary estate.

The money left in the hands of the personal representative¹ and any investments for the time being representing it, and any part of the estate of the deceased which remains unsold and is not required for administration purposes, is referred to as 'the residuary estate of the intestate'², which is to be distributed in the manner or held upon the trusts prescribed by statute³.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 Administration of Estates Act 1925 s 33(4) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 5(4)). The residuary estate of the intestate includes assets which do not fall for purposes of succession to be regulated by English law: *Re Collens*, *Royal Bank of Canada (London) Ltd v Krogh* [1986] Ch 505, [1986] 1 All ER 611.

3 See PARA 591 et seq post.

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558. Income pending distribution.

The income, including net rents and profits¹ of real estate² and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income, of so much of the deceased's real and personal estate as may not be disposed of by his will, if any, or may not be required for administration purposes, may, however that estate is invested, as from the deceased's death, be treated and applied as income, and for that purpose any necessary apportionment may be made between the tenant for life and the remainderman³.

1 For the meaning of 'rent' see the Administration of Estates Act 1925 s 55(1)(xxi); and PARA 346 note 1 ante. 'Income' includes rents and profits: s 55(1)(v).

2 For the meaning of 'real estate' see PARA 3 note 1 ante.

3 Administration of Estates Act 1925 s 33(5). This provision has been held to exclude the rule in *Howe v Earl of Dartmouth* (see PARA 540 ante) with regard to the property as to which the deceased died intestate (*Re Sullivan*, *Dunkley v Sullivan* [1930] 1 Ch 84; but see *Re Fisher*, *Harris and Fisher v Harris* [1943] Ch 377, [1943] 2 All ER 615. See also PARA 601 note 4 post. As to the apportionment of income between the tenant for life and the remainderman see PARA 535 et seq ante. As to the special provisions for the incidence of income tax on the income of the residuary estate see INCOME TAXATION vol 23(2) (Reissue) PARA 1531 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(i) Personal Estate/559. Necessity for assent.

(5) ASSENTS

(i) Personal Estate

559. Necessity for assent.

The bequest of a legacy, whether general¹ or specific², transfers only an inchoate property to the legatee: the executor's assent³ is necessary to render it complete and perfect⁴. The right is one which devolves on the legatee's personal representatives should he die before the assent is given⁵. In the case of a release of a debt by will⁶ the executor's assent is necessary, as the release in effect amounts to a legacy of the debt⁷.

The necessity for assent by an executor applies to residuary bequests⁸, and to interests arising under a partial intestacy⁹, and an executor may assent to part of a residuary gift without assenting to the whole¹⁰.

The assent of one of several representatives to a bequest of pure personality is sufficient¹¹, even though the bequest is to himself¹².

An executor may assent before probate¹³, and the assent will not be affected by his dying without having obtained probate, provided the will is subsequently proved¹⁴.

An executor may be compelled by the legatee to assent, should he refuse to do so without just cause¹⁵.

1 As to general legacies see PARA 473 ante; and WILLS vol 50 (2005 Reissue) PARA 709.

2 As to specific legacies see PARA 472 ante; and WILLS vol 50 (2005 Reissue) PARA 709.

3 As to evidence of assent see PARA 564 et seq post.

4 An administrator cannot assent in favour of a person entitled on intestacy in respect of pure personality: see PARA 563 note 1 post.

5 *Re Leigh's Will Trusts*[1970] Ch 277, [1969] 3 All ER 432.

6 As to the release of a debt by will see WILLS vol 50 (2005 Reissue) PARA 588.

7 *Sibthorp v Moxton* (1747) 1 Ves Sen 49 at 50 per Lord Hardwicke LC.

8 As to residuary bequests see PARA 531 et seq ante.

9 As to partial intestacy see PARA 615 et seq post.

10 *Austin v Beddoe* (1893) 41 WR 619; but see *Elliott v Elliott* (1841) 9 M & W 23 at 27 per Parke B. The doctrine which always applied to chattels real was extended by the Land Transfer Act 1897 s 3(1) (repealed as respects deaths after 1925) to devises of real estate vesting in the personal representative.

11 *Went Off Ex* (14th Edn) 413.

12 *Townson v Tickell* (1819) 3 B & Ald 31 at 40.

13 *Johnson v Warwick* (1856) 17 CB 516. See also PARAS 29-30 ante. An administrator derives his title from the grant, so a person entitled to administer cannot assent before grant: see PARA 33 ante.

14 *Brazier v Hudson* (1836) 8 Sim 67. As to an executor's liability to be sued see PARAS 32 ante, 566 post; and as to actions by and against representatives see PARA 808 et seq post.

15 Went Off Ex (14th Edn) 70.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(i) Personal Estate/560. When a condition may be attached to assent.

560. When a condition may be attached to assent.

A personal representative has no power to attach as a condition to his assent the performance of some subsequent act by the legatee or other person entitled, although he may apparently agree to give his assent upon the performance of a condition precedent¹.

1 Went Off Ex (14th Edn) 429. As to security for duties etc as a condition of giving an assent see PARA 565 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(i) Personal Estate/561. Assent by implication.

561. Assent by implication.

An assent to the vesting of personal estate or of an equitable interest in real estate¹ may be express or implied. It need not be in writing², nor need it be given in any particular form. Informal expressions, if sufficiently clear to indicate intention, may amount to an assent³. The assent may also be implied from the executor's conduct. Thus the application, in the maintenance of minors, of rents of leaseholds bequeathed to the executor in trust for maintaining them during minority and afterwards in trust for the legatee on attaining his majority⁴; allowing a legatee of a term to receive the income⁵; the payment by the executor of rent, coupled with the charging of the legatee with the payments in account⁶; or the payment of a charge subject to which a legacy is given⁷, would amount to an assent to the bequest. However, an executor may and often does make general payments to a legatee without binding himself to an assent, and the court will not infer an assent in such circumstances unless there is evidence that the executor intended to assent as, for instance, by representations to that effect or by special payments out of or on account of rents to which the legatee would be entitled after assent⁸.

In case of dispute, the question whether there has been an assent or not is generally one of fact⁹; but an expression which is ambiguous and applies equally to either view is no evidence of an assent¹⁰.

An assent to a life interest is an assent to the interest in remainder, and conversely an assent to an interest in remainder enures for the benefit of the tenant for life¹¹.

1 As to an assent to the vesting of a legal estate see PARA 564 post.

2 Cf the Administration of Estates Act 1925 s 36(4): see PARA 564 post.

3 See eg *Doe d Sturges v Tatchell* (1832) 3 B & Ad 675; *Barnard v Pumfrett* (1841) 5 My & Cr 63; and Com Dig, Administration (C6). The carrying in of the residuary account does not raise any implication that the duties of the executors are completed: see *Attenborough v Solomon* [1913] AC 76, HL; *IRC v Smith* [1930] 1 KB 713, CA.

If legal title to property (eg shares in companies) is to pass, the appropriate transfer will be needed to vest the legal right in the beneficiary; in the case of savings certificates an encashment is not necessary, but they can be transferred: *Note: Inherited National Savings* [1954] 1 All ER 519n.

4 *Paramour v Yardley* (1579) 2 Plowd 539.

5 Went Off Ex (14th Edn) 414. However, cf *Wise v Whitburn* [1924] 1 Ch 460. As to the position where, since 1925, a personal representative permits possession of land to be taken by a person entitled see the Administration of Estates Act 1925 s 43(1); and PARA 441 ante.

6 *Doe d Mabberley v Mabberley* (1833) 6 C & P 126.

7 *Young v Holmes* (1717) 1 Stra 70.

8 *Thorne v Thorne* [1893] 3 Ch 196.

9 *Elliott v Elliott* (1841) 9 M & W 23 at 27; *Mason v Farnell* (1844) 12 M & W 674. In *IRC v Smith* [1930] 1 KB 713, CA, it was held that whether the residue had been ascertained and a bequest assented to was a question of fact, which, for the purpose of super tax, was to be determined by the commissioners; and further that the existence of an outstanding mortgage did not of itself prevent the implication of an assent, though the contrary conclusion had been reached in *Daw v IRC* (1928) 14 TC 58.

10 *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 520 per Alderson B.

11 *Stevenson v Liverpool Corp* (1874) LR 10 QB 81; *Adams v Peirce* (1724) 3 P Wms 11. See also *Wise v Whitburn* [1924] 1 Ch 460.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(i) Personal Estate/562. Gift to executor.

562. Gift to executor.

In the case of a gift to the executor, assent (which may be express or implied) is equally necessary¹. If the executor in his manner of administering the property does any act which shows that he regards himself as owning it beneficially, that is to be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent².

Even before 1926, if a term was bequeathed to an executor for his life, mere entry into possession was not sufficient to amount to an assent³, since such an assent would amount to an assent to the bequest in remainder⁴, which would prevent the executor from availing himself of the estate in remainder for the purpose of paying debts or legacies⁵. A similar rule applies to a gift to an executor of a life interest in furniture⁶.

1 Toller's Law of Executors (7th Edn) 345. As to the requirement for an assent in writing in the case of legal estates in land see PARA 564 post.

2 *Doe d Hayes v Sturges* (1816) 7 Taunt 217 at 223 per Gibbs CJ. In *Fenton v Clegg* (1854) 9 Exch 680, an entry by an executor into possession of a leasehold, and a disposition of it by his will, were held to amount to an assent to the bequest to himself.

3 *Doe d Hayes v Sturges* (1816) 7 Taunt 217; *Doe d Sturges v Tatchell* (1832) 3 B & Ad 675 at 680.

- 4 See PARA 561 ante; and *Trail v Bull* (1853) 22 LJ Ch 1082 at 1083 per Lord Cranworth.
- 5 *Doe d Hayes v Sturges* (1816) 7 Taunt 217 at 221; *A-G v Potter* (1842) 5 Beav 164.
- 6 *Richards v Browne* (1837) 3 Bing NC 493.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(ii) Real Estate/563. Power to assent.

(ii) Real Estate

563. Power to assent.

Since 1 January 1926 a personal representative¹ may assent² to the vesting, in any person who may be entitled to it, of any estate or interest in real estate³ to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests⁴, and which devolved upon the personal representative⁵.

The persons in whose favour the assent may be executed are those entitled by devise, bequest, devolution, appropriation⁶ or otherwise⁷. They may be entitled beneficially or as trustees or personal representatives⁸.

An assent in relation to real estate must be made by all executors who have proved the will or by all the administrators, as the case may be⁹.

Where, on the death of the testator or intestate, real estate is comprised in a settlement¹⁰, the deceased's personal representatives may vest it by means of a vesting assent in the tenant for life or statutory owners¹¹.

Any person who against the personal representatives claims to be entitled to have real estate vested in him by an assent may apply to the court for a vesting order¹².

1 He is an executor or administrator: see PARA 4 ante. An administrator can still not assent in favour of a person entitled on an intestacy to pure personalty, but in most cases of this nature either delivery is sufficient or formal transfer is necessary.

2 As to the form of an assent see PARA 564 post; and as to the effect of an assent see PARA 566 et seq post.

3 For the meaning of 'real estate', which includes chattels real, see PARA 3 note 1 ante.

4 See the Law of Property Act 1925 s 176; and PARA 372 ante. See also REAL PROPERTY vol 39(2) (Reissue) PARA 117 et seq.

5 See the Administration of Estates Act 1925 s 36(1). The power has existed since 1 January 1926. An assent may be made whether the testator or intestate died before or after that date: s 36(12). In the case of deaths before 1926 it was necessary that the estate had not been fully administered on that date. As to property devolving on the personal representative see PARA 335 ante. As it is a condition that the property should be property to which the deceased was entitled and which devolved upon the personal representative, there is doubt whether an assent is applicable in the case of property which falls into the deceased's estate after his death and is conveyed to the personal representative to hold as a part of his estate.

6 As to appropriation see PARA 573 et seq post.

7 See the Administration of Estates Act 1925 s 36(1). Whatever meaning may be attached to the word 'otherwise' it is in practice undesirable that an assent should be given except in favour of persons entitled by devise, bequest, devolution or appropriation. For an example of an assent giving effect to a contract of sale made by the testator see *GHR Co v IRC* [1943] KB 303, [1943] 1 All ER 424.

8 See the Administration of Estates Act 1925 s 36(1).

9 See *ibid* s 2(2) (as amended); and PARA 443 ante. See also PARA 566 note 2 post.

10 As to what constitutes a settlement see the Settled Land Act 1925 s 1 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 678.

11 See *ibid* ss 6-8 (s 7 as amended); SETTLEMENTS vol 42 (Reissue) PARAS 697-698.

12 Administration of Estates Act 1925 s 43(2). The county court has jurisdiction under this provision where the estate in respect of which the application is made does not exceed in amount or value the county court limit: s 43(4) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt III para 14). As to the county court limit see PARA 275 note 3 ante. Any such application should be brought under CPR Pt 8 procedure: see CPR Pt 8; *Practice Direction-How to make claims in the Schedule rules and other claims* (1999) PD 8B. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

UPDATE

563 Power to assent

NOTE 12--*Practice Direction--How to make claims in the Schedule rules and other claims* (1999) PD 8B amended. Administration of Estates Act 1925 s 43(2) amended by the Land Registration Act 2002 Sch 11 para 3.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(ii) Real Estate/564. Form of assent.

564. Form of assent.

An assent to the vesting of a legal estate¹ in land is required to be in writing². It must be signed by the personal representative³ and name the person in whose favour it is given; an assent in this form⁴ operates to vest in that person the legal estate to which it relates⁵. An assent not in writing or not in favour of a named person is not effectual to pass a legal estate⁶.

It follows that an assent to the vesting in the person entitled to it of any equitable interest in real estate need not be in writing⁷.

The statutory covenants as to title implied by a person being expressed to convey as personal representative are implied in an assent in writing made before 1 July 1995 as in a conveyance by deed made before that date⁸. In an assent in writing made on or after 1 July 1995 there are implied the same covenants as in any other instrument effecting or purporting to effect a disposition of property with limited title guarantee from that date onwards⁹.

If the form of an assent is used where a conveyance is necessary to carry the legal estate¹⁰, this will be valid as a conveyance if it is executed under seal and the intention is clear¹¹, as preference is given to intent over technical import and form¹².

1 For the meaning of 'legal estates' see PARA 387 note 2 ante.

2 Administration of Estates Act 1925 s 36(4).

3 For the meaning of 'personal representative' see PARA 4 ante.

4 For statutory forms of assent see the Law of Property Act 1925 s 206, Sch 5, Forms 8, 9; and SALE OF LAND vol 42 (Reissue) PARA 91. An assent is not required to be under seal: s 52(2)(a). In the case of registered land the

assent must be in the prescribed form to authorise the registrar to register the person named in the assent as proprietor of the land: Land Registration Act 1925 s 41(4). It was held under the Land Transfer Act 1897 s 3 (repealed as regards deaths after 1925), that an executor was not bound to describe the land in more precise terms than those contained in the will: *Re Pix, Plomley v Stileman* [1901] WN 165. In practice the description is often taken from the last conveyance, since the assent may ultimately become a root of title. As to stamp duty see PARA 571 post.

5 Administration of Estates Act 1925 s 36(4).

6 Ibid s 36(4). *Re Edwards' Will Trusts, Edwards v Edwards* [1982] Ch 30, [1981] 2 All ER 941, CA. It is desirable that a personal representative who is a trustee or devisee should, after the administration has been completed, execute an assent in writing in his own favour, in order to show that his duties as personal representative have ceased, and that he now holds the property as trustee or devisee: *Re Yerburch, Yerburch v Yerburch* [1928] WN 208. If he dies without having executed an assent in his own favour it is in practice necessary on a sale of land to obtain a grant of administration de bonis non to his estate for the protection of the purchaser (see PARA 201 ante); but since there is no question of a legal estate 'passing', it may not be strictly necessary: see *Re Pitt, Pitt v Mann* (1928) 44 TLR 371; *Re Hodge, Hodge v Griffiths* [1940] Ch 260; *Harris v Harris* [1942] LJNCCR 119. It was held in *Re King's Will Trusts, Assheton v Boyne* [1964] Ch 542, [1964] 1 All ER 833, that a personal representative who is a trustee or devisee must execute an assent in his own favour, but the relevant case law was not all before the court. In *Re Edwards' Will Trusts, Edwards v Edwards* supra, it was held that, although the legal estate might not pass on the death of an administrator beneficially entitled who had failed to execute a written assent, the equitable beneficial interest in the property did vest and accordingly formed part of his estate on his death. See also *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522, applying *Re Ponder, Ponder v Ponder* [1921] 2 Ch 59, and distinguishing *Harvell v Foster* [1954] 2 QB 367, [1954] 2 All ER 736, CA. As to when a personal representative becomes a trustee see PARA 570 post.

7 *Re Edwards' Will Trusts, Edwards v Edwards* [1982] Ch 30, [1981] 2 All ER 941, CA. As to assent by implication see PARA 561 ante. A personal representative may let a beneficiary into possession of land before giving an assent, however, without prejudice to his power to retake possession or dispose of the land: see the Administration of Estates Act 1925 s 43(1); and PARA 441 ante.

8 See ibid s 36(3) (repealed); Law of Property Act 1925 s 76(1)(F), Sch 2 Pt VI (both repealed as regards dispositions made on or after 1 July 1995); and SALE OF LAND vol 42 (Reissue) PARA 337.

9 See the Law of Property (Miscellaneous Provisions) Act 1994 s 12(3). As to the covenants implied in an instrument effecting or purporting to effect a disposition of property with limited title guarantee see ss 2, 3(3), 4, 5; and SALE OF LAND vol 42 (Reissue) PARA 351.

10 In the case where the statutory provisions for assenting are not relevant because the transferee is not entitled by devise, bequest, devolution, appropriation or otherwise: see PARA 563 ante.

11 *Re Stirrup's Contract, Stirrup v Foel Agricultural Co-operative Society* [1961] 1 All ER 805, [1961] 1 WLR 449.

12 *Marquis Cholmondeley v Lord Clinton* (1821) 2 Jac & W 1 at 91.

UPDATE

564 Form of assent

NOTE 4--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(ii) Real Estate/565. Security for duties, debts or liabilities.

565. Security for duties, debts or liabilities.

A personal representative¹ may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duties, debt or liability to which the estate or interest is subject, but is not entitled to postpone the giving of an assent merely by reason of the subsistence of any such duties, debt or liability if reasonable arrangements have been made for discharging the same².

An assent may be given subject to any legal estate or charge by way of legal mortgage³, but no beneficiary is entitled to compel an executor to exercise this power⁴.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 Administration of Estates Act 1925 s 36(10). This provision replaced the Land Transfer Act 1897 s 3(1) (repealed as regards deaths after 1925) by which the personal representatives might assent or convey subject to a charge for the payment of any money which they were liable to pay. The charge did not extend to debts for which, prior to the Act, the personal representatives of the debtor would not have been liable if they had parted with the whole personal estate, and therefore, where the personal representatives had given the usual statutory notices to the creditor, the charge did not apply to debts of which they had no notice at the date of the conveyance to the devisees: *Re Cary and Lott's Contract* [1901] 2 Ch 463. Although the assent or conveyance does not mention the charge, the land remains subject to it where the grantee has notice: *Parker v Judkin* [1931] 1 Ch 475, CA.

3 Administration of Estates Act 1925 s 36(10).

4 *Williams v Holland* [1965] 2 All ER 157, [1965] 1 WLR 739, CA. As to the interest of a beneficiary in an unadministered estate see PARA 341 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(iii) Effect of Assent; Stamp Duty and Costs/566. Irrevocability and relation back.

(iii) Effect of Assent; Stamp Duty and Costs

566. Irrevocability and relation back.

The assent once given is irrevocable¹. An assent in relation to real estate operates to vest in any person entitled to it the estate or interest to which the assent relates². The title to a legacy vests immediately upon the assent in the legatee³ so as to enable him to bring an action at law against the executor or any other person in possession of the bequest⁴. An assent in relation to real estate relates back to the deceased's death unless a contrary intention appears⁵, and the legatee of a specific legacy has the right to recover the intermediate profits of the thing bequeathed⁶. Where executors who are also trustees under the will have assented they cease to hold the property as executors and from then on hold it as trustees⁷.

1 *Noel v Robinson* (1681) 2 Vent 358.

2 Administration of Estates Act 1925 s 36(2). An assent is a 'conveyance' for the purposes of the Act: see s 55(1)(iii); and PARA 267 note 1 ante. As to the effect of an assent executed under seal where a conveyance proper was required see PARA 564 ante.

3 It is in the person who is the rightful legatee and not necessarily in the person in whom the assent purports to vest the property: see *Re West, West v Roberts* [1909] 2 Ch 180, where a codicil was found, some years after the assent, altering a bequest of shares and giving them to another legatee. As to the effect of an assent in relation to real estate see PARA 567 note 5 post.

4 *Saunders's Case* (1599) 5 Co Rep 12a; *Williams v Lee* (1745) 3 Atk 223; *Doe d Lord Saye and Sele v Guy* (1802) 3 East 120; *Re Culverhouse, Cook v Culverhouse* [1896] 2 Ch 251. An action at law cannot be brought

against an executor upon a promise to pay a general legacy: *Jones v Tanner* (1827) 7 B & C 542. As to actions against personal representatives see PARA 808 et seq post.

5 Administration of Estates Act 1925 s 36(2).

6 *Re West, West v Roberts* [1909] 2 Ch 180; *IRC v Hawley* [1928] 1 KB 578. See PARA 504 ante.

7 *Attenborough v Solomon* [1913] AC 76, HL; but cf *Wise v Whitburn* [1924] 1 Ch 460. As to when a personal representative becomes a trustee see further PARA 569 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(iii) Effect of Assent; Stamp Duty and Costs/567. Protection of purchaser.

567. Protection of purchaser.

If no notice of a previous assent or conveyance affecting the legal estate has been placed on or annexed to the probate or letters of administration, an assent or conveyance¹ by a personal representative² in respect of that legal estate³ must be taken in favour of a purchaser⁴ as sufficient evidence⁵ that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him and upon the proper trusts, if any⁶. The assent or conveyance does not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge on it⁷. An assent or conveyance given or made by a personal representative does not, except in favour of a purchaser of a legal estate, prejudice the right of the personal representative or any other person to recover the estate or interest to which it relates, or to be indemnified out of the estate or interest against any duties, debt or liability to which the estate or interest would have been subject if there had not been any assent or conveyance⁸.

Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative may require that notice of the assent or conveyance be written or indorsed on or permanently annexed to the probate or letters of administration, at the cost of the estate, and that the probate or letters of administration be produced, at the like cost, to prove that the notice has been placed on it or annexed to it⁹.

1 For the meaning of 'conveyance' see PARA 267 note 1 ante.

2 For the meaning of 'personal representative' see PARA 4 ante.

3 For the meaning of 'legal estates' see PARA 387 note 2 ante.

4 For these purposes, 'purchaser' means a purchaser for money or money's worth: Administration of Estates Act 1925 s 36(11). Cf the extended definition of 'purchaser' in s 55(1)(xviii): see PARA 267 note 4 ante.

5 The assent is not 'conclusive' evidence, but a purchaser may accept it unless or until, on a proper investigation of the vendor's title, facts come to his knowledge which indicate the contrary: *Re Duce and Boots Cash Chemists (Southern) Ltd's Contract* [1937] Ch 642, [1937] 3 All ER 788.

6 Administration of Estates Act 1925 s 36(7). It will be noted that by s 36(4) an assent is to operate to vest a legal estate in a named person: see PARA 564 ante. Apparently this provision is not the absolute provision it appears to be, for, if it were, there would be no need for s 36(7). The reason appears to be that s 36(4) is governed by s 36(1), (2), and an assent can only operate to vest an estate or interest in the person if he is in fact entitled to it.

7 Ibid s 36(7).

8 Ibid s 36(9).

9 Ibid s 36(5). A purchaser from a personal representative can insist on an acknowledgement for production and delivery of copies of the probate or letters of administration (*Re Miller and Pickersgill's Contract* [1931] 1 Ch 511), but a subsequent purchaser will generally be debarred from objecting to the absence of such an acknowledgement: see the Law of Property Act 1925 s 45(7); and SALE OF LAND vol 42 (Reissue) PARA 132. As to the effect of a statement in writing by the personal representative that he has not given or made an assent or conveyance in respect of the legal estate see the Administration of Estates Act 1925 s 36(6); and PARA 446 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(iii) Effect of Assent; Stamp Duty and Costs/568. Assents in relation to trusteeship.

568. Assents in relation to trusteeship.

The power to assent is confined to personal representatives¹, and difficulties can arise as to whether a personal representative who may have fully administered and become a trustee still has power to assent and whether he needs to assent in his own favour as trustee². The capacities of personal representative and trustee are not mutually exclusive, and a personal representative who has fully administered the estate and holds the residue as a trustee is not thus necessarily and automatically discharged from his obligations as personal representative, or, in particular, from the obligations of any bond which he may have entered into for the due administration of the estate³. A personal representative retains his character as such (as distinct from his statutory powers of management⁴) for all time or, in the case of a grant of administration for a limited period, until the termination of the period of the grant⁵.

1 See PARAS 559, 563 ante.

2 See PARA 570 post.

3 *Harvell v Foster* [1954] 2 QB 367, at 379-380, 383, [1954] 2 All ER 736 at 743, 745, CA, per Sir R Evershed MR (criticising statements in *Re Ponder*, *Ponder v Ponder* [1921] 2 Ch 59). See also *Re Cockburn's Will Trusts*, *Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522, distinguishing *Harvell v Foster* supra; and following *Re Ponder*, *Ponder v Ponder* supra. As to the principle that taking out probate may involve the acceptance of the office of trustee see PARA 25 ante.

4 As to such statutory powers see PARA 570 post.

5 *Re Timmis*, *Nixon v Smith* [1902] 1 Ch 176 at 183; *Harvell v Foster* [1954] 2 QB 367 at 383, [1954] 2 All ER 736 at 745, CA, per Sir R Evershed MR. The representative retains, for example, the capacity to represent the estate in legal proceedings: *Harvell v Foster* supra.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(iii) Effect of Assent; Stamp Duty and Costs/569. When a personal representative becomes a trustee.

569. When a personal representative becomes a trustee.

If property is specifically devised or bequeathed to an executor upon trust he becomes trustee of it when he has assented¹ or severed the property from the rest of the estate² or has executed a declaration of trust³. As regards residue, the major change in character from representation to

trusteeship occurs when the estate has been fully administered in the sense that all debts and liabilities have been discharged and the residue ascertained⁴. When the trusts affecting the residue are designed to continue after completion of the administration, the executor should then execute an assent to the vesting of the residue in himself as trustee⁵.

1 *Dix v Burford* (1854) 19 Beav 409; *Clegg v Rowland* (1866) LR 3 Eq 368 at 373. See also *Attenborough v Solomon* [1913] AC 76 at 82-83, HL; *Byrchall v Bradford* (1822) 6 Madd 235 at 240-241; *Wise v Whitburn* [1924] 1 Ch 460. For the circumstances in which an assent is required to be in writing see PARA 564 ante.

2 *Ex p Dover* (1834) 5 Sim 560; *Phillipo v Munnings* (1837) 2 My & Cr 309; *O'Reilly v Walsh* (1872) 6 IR Eq 555 (affd 7 IR Eq 167); *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522.

3 *Re Rowe, Jacobs v Hind* (1889) 58 LJ Ch 703, CA.

4 *Re Smith, Henderson-Roe v Hitchins* (1889) 42 ChD 302 at 304; *Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288 at 296; *Re Timmis, Nixon v Smith* [1902] 1 Ch 176 at 182-183; *Re Gompertz Estate, Parker v Gompertz* (1910) 55 Sol Jo 76 (executor); *Harvell v Foster* [1954] 2 QB 367 at 379-380, 383, [1954] 2 All ER 736 at 745, CA, per Sir R Evershed MR (administrator); *Charlton v Earl of Durham* (1869) 4 Ch App 433 at 439; *Re Willey* [1890] WN 1, CA; *Eaton v Daines* [1894] WN 32 (executor); *Re Ponder, Ponder v Ponder* [1921] 2 Ch 59 (administrator). As to statutory trusts applicable on an intestacy see PARA 555 et seq ante. As to the principle that the acceptance of an executorship involves acceptance of the trusts imposed by the will see PARA 25 ante.

5 *Re Yerburch, Yerburch v Yerburch* [1928] WN 208 (administrator). Before 1926 an administrator could not assent. Since 1 January 1926 an assent must be in writing in order to pass a legal estate in land: see PARA 564 ante. Although it has been stated in certain cases that an executor becomes a trustee (see eg *Attenborough v Solomon* [1913] AC 76 at 83-84, HL; *Re Trollope's Will Trusts, Public Trustee v Trollope* [1927] 1 Ch 596 at 605; *Re Gibbs, Midland Bank Executor and Trustee Co Ltd v IRC* [1951] Ch 933 at 938, [1951] 2 All ER 63 at 67 per Danckwerts J), it seems that the execution of an assent in his favour is not strictly necessary in order to clothe a personal representative with the character of a trustee: see PARA 564 note 6 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(iii) Effect of Assent; Stamp Duty and Costs/570. Effect of personal representative becoming a trustee.

570. Effect of personal representative becoming a trustee.

When after administration a personal representative holds as trustee on trusts imposed by statute on the death of a person intestate¹ he may continue to exercise the special powers of management conferred upon a personal representative by the Administration of Estates Act 1925² so long as any beneficiary is a minor or any life interest is subsisting³. If, however, the personal representative, having completed the administration, holds on trusts declared by the will, those special powers of management are no longer available to him, notwithstanding the minority of a beneficiary or the subsistence of a life interest⁴. In either case, being a trustee he is entitled to exercise the statutory power of appointing new or additional trustees⁵, or to apply to the court⁶ for the appointment of new trustees⁷.

The question whether a personal representative has become a trustee is also important in the following instances:

- (1) when considering the application of the Limitation Act 1980⁸;
- (2) when considering the form of proceedings against him, whether for devastavit⁹ or breach of trust¹⁰; and
- (3) to determine whether or not he can as sole personal representative or trustee give a good receipt for capital money¹¹.

- 1 See the Administration of Estates Act 1925 s 33 (as amended); and PARA 555 et seq ante.
- 2 See *ibid* s 39 (as amended); and PARA 438 ante.
- 3 *Re Trollope's Will Trusts, Public Trustee v Trollope* [1927] 1 Ch 596; cf *Re Wilks, Keefer v Wilks* [1935] Ch 645, where infants were beneficially interested under the law of the domicile of a deceased person who died intestate as to property in this country.
- 4 *Re Trollope's Will Trusts, Public Trustee v Trollope* [1927] 1 Ch 596.
- 5 See the Trustee Act 1925 s 36 (as amended); *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522; and TRUSTS vol 48 (2007 Reissue) PARAS 835-836. As to the special powers of personal representatives to appoint trustees of minors' property see PARA 496 ante.
- 6 See the Trustee Act 1925 s 41 (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 849. Section 41(4) prohibits the appointment of an executor or administrator as distinct from a trustee: see TRUSTS vol 48 (2007 Reissue) PARA 857.
- 7 *Re Willey* [1890] WN 1, CA (application to court by executors for appointment of new trustee); *Eaton v Daines* [1894] WN 32 (appointment by executors who had become trustees held good); *Re Ponder, Ponder v Ponder* [1921] 2 Ch 59 (new trustee appointed by court to act with administratrix who had cleared estate); *Re Pitt, Pitt v Mann* (1828) 44 TLR 371 (appointment by administratrix who had cleared estate; appointment held good). For comment on *Re Ponder, Ponder v Ponder* supra, and *Re Pitt, Pitt v Mann* supra, see *Harvell v Foster* [1954] 2 QB 367 at 382-383, [1954] 2 All ER 736 at 745, CA, per Sir R Evershed MR.
- 8 If the will imposes no duties to be performed by the personal representative as trustee, the limitation period for trust property will not normally apply: *Re Richardson, Pole v Pattenden* [1920] 1 Ch 423, CA; see also *Re Davis, Evans v Moore* [1891] 3 Ch 119, CA; *Re Barker, Buxton v Campbell* [1892] 2 Ch 491. If, on the other hand, trusts arise under the will or intestacy it may be clear, by reason of the lapse of time or otherwise, that the estate has been administered and that the property in question is held by the personal representative as trustee: *Re Oliver, Theobald v Oliver* [1927] 2 Ch 323. See also eg *Re Swain, Swain v Bringeman* [1891] 3 Ch 233; *Re Page, Jones v Morgan* [1893] 1 Ch 304; *Re Timmis, Nixon v Smith* [1902] 1 Ch 176. See the Limitation Act 1980 ss 21, 22; and LIMITATION PERIODS vol 68 (2008) PARA 1140 et seq.
- 9 See *ibid* s 23; and LIMITATION PERIODS vol 68 (2008) PARA 1008. See also *Charlton v Low* (1734) 3 P Wms 328 at 331. As to devastavit see PARA 1542 et seq post.
- 10 See PARA 792 post.
- 11 See PARA 451 note 3 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(iii) Effect of Assent; Stamp Duty and Costs/571. Stamp duty.

571. Stamp duty.

The fact that the assent operates to vest real estate in the person in whose favour it is made does not render the assent liable to stamp duty where such duty would not otherwise be payable¹. Thus a simple assent whether under hand or under seal attracts no stamp duty². An assent to give effect to a contract of sale entered into in the lifetime of the deceased attracts ad valorem stamp duty as a conveyance on sale³, and an assent executed in pursuance of a power of appropriation under which the beneficiary's consent is required⁴ is contractual in substance and therefore requires to be stamped as a conveyance on sale⁵.

1 See the Administration of Estates Act 1925 s 36(11); and *Kemp v IRC* [1905] 1 KB 581. As to when stamp duty is payable see STAMP DUTY AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARAS 1001, 1010 et seq.

2 See the Finance Act 1985 ss 85(1), 98(6), Sch 24, Sch 27 Pt IX(2); and STAMP DUTY AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1002. See also PARA 582 post.

3 *GHR Co v IRC* [1943] KB 303, [1943] 1 All ER 424. See STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1027 et seq. An assent cannot of course be used to give effect to a sale by the personal representatives: see PARA 563 note 7 ante.

4 Such consent is in general a prerequisite of the power of appropriation conferred by the Administration of Estates Act 1925 s 41 (as amended): see PARA 573 et seq post.

5 In many cases the instrument can be certified as exempt from stamp duty in accordance with the Stamp Duty (Exempt Instruments) Regulations 1987, SI 1987/516 (as amended): see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1083. See further PARA 582 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(5) ASSENTS/(iii) Effect of Assent; Stamp Duty and Costs/572. Costs.

572. Costs.

Where executors assent to specific legacies, the costs of transfer are payable by the legatees¹, but the costs of assent in relation to settled land are payable out of the trust estate².

1 *Re Grosvenor, Grosvenor v Grosvenor* [1916] 2 Ch 375. See also PARAS 432-433, 483 text and note 5 ante.

2 See the Settled Land Act 1925 s 8(2). This is so both in the case of land that ceased to be settled on the death of the deceased and where it continues to be settled: see ss 7(5) (as amended), 8(2); and SETTLEMENTS vol 42 (Reissue) PARA 698.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(i) Statutory Power/573. Power of appropriation.

(6) APPROPRIATION

(i) Statutory Power

573. Power of appropriation.

A personal representative¹ has a statutory power of appropriation, whether the deceased died intestate² or not and whenever he died³ subject, generally, to certain consents⁴.

The personal representative may appropriate any part of the real or personal estate⁵, including things in action, in their actual condition or state of investment at the time of appropriation, in or towards satisfaction of any legacy bequeathed by the deceased or of any other interest or share in his property⁶, whether settled or not⁷, as to the personal representative may seem just and reasonable⁸, according to the respective rights of the persons interested in the property⁹. The power extends to property over which a testator has exercised a general power of appointment, including the statutory power¹⁰ to dispose of entailed interests¹¹.

The statutory power of appropriation authorises the setting apart of a fund to answer an annuity by means of the income¹² of that fund or otherwise¹³; but it is not to be exercised so as to affect prejudicially any specific devise or bequest¹⁴; and it does not prejudice any other power of appropriation conferred by law¹⁵ or by the will¹⁶, if any, of the deceased¹⁷. It takes effect with any extended powers conferred by that will, if any¹⁸.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 For the meaning of 'intestate' see PARA 555 note 1 post.

3 See the Administration of Estates Act 1925 s 41(1) (as amended), (9). As to the power of the surviving husband or wife of an intestate to require the intestate's personal representative to appropriate the matrimonial home towards his or her interest under the intestacy see PARA 593 post.

4 See PARAS 574-575 post.

5 For the meaning of 'real estate' see PARA 3 note 1 ante.

6 For the meaning of 'property' see PARA 4 note 4 ante.

7 See PARA 575 note 2 post. As to settled property see SETTLEMENTS. The personal representative can appropriate in his own favour as beneficiary but such an appropriation would be invalid if made without the consent of the beneficiaries or the sanction of the court. The self-dealing rule that a disposition of trust property to a trustee was automatically voidable at the suit of a beneficiary also applies to personal representatives, who are not exempted from that rule by the Administration of Estates Act 1925 s 41 (as amended): *Kane v Radley-Kane*[1999] Ch 274, [1998] 3 All ER 753. See also *Re Thompson's Settlement*[1986] Ch 99. Cf *Re Richardson, Morgan v Richardson*[1896] 1 Ch 512. As to the self-dealing rule see TRUSTS vol 48 (2007 Reissue) PARA 938.

8 As to the valuation of the deceased's property see PARA 577 post.

9 Administration of Estates Act 1925 s 41(1). The personal representative must have regard to the rights of any person who may afterwards come into existence or who cannot be found or ascertained at the time of appropriation and of any other person whose consent is not required under the provisions as to consents (as to which see PARAS 574-575 post): s 41(5). However, nothing in s 41 (as amended) prevents the personal representative from giving effect to the statutory right of the surviving spouse of an intestate as to the appropriation of the matrimonial home: see PARA 593 post.

10 See PARA 372 ante.

11 Administration of Estates Act 1925 s 41(9). As to entailed interests see REAL PROPERTY vol 39(2) (Reissue) PARA 117 et seq.

12 For the meaning of 'income' see PARA 558 note 1 ante.

13 Administration of Estates Act 1925 s 41(9).

14 Ibid s 41(1) proviso (i).

15 See PARA 578 post.

16 For the meaning of 'will' see PARA 3 note 1 ante.

17 Administration of Estates Act 1925 s 41(6) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 6(1), (3)).

18 Administration of Estates Act 1925 s 41(6) (as amended: see note 17 supra).

574. Consents required: absolute interests.

Save as otherwise provided by the will¹ of the deceased², the exercise of the statutory power of appropriation requires certain consents³.

If the appropriation is for the benefit of a person of full age and capacity absolutely and beneficially entitled in possession⁴, the consent of that person is necessary⁵.

If the person whose consent is so required is a minor⁶ or is incapable by reason of mental disorder⁷ of managing and administering his property⁸ and affairs the consent must be given on his behalf by his parents or parent, testamentary or other guardian or receiver, or if, in the case of a minor, there is no such parent or guardian, by the court on the application of his litigation friend⁹.

If no receiver is acting for a person suffering from mental disorder, then, if the appropriation is of an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, no consent is required¹⁰.

1 For the meaning of 'will' see PARA 3 note 1 ante.

2 See the Administration of Estates Act 1925 s 41(6) (as amended); and PARA 573 ante.

3 See *ibid* s 41(1) proviso (ii) (as amended: see note 9 *infra*).

4 For the meaning of 'possession' see PARA 441 note 8 ante.

5 Administration of Estates Act 1925 s 41(1) proviso (ii)(a).

6 From 1 January 1997, where a person purports to convey a legal estate in land to a minor or minors alone, the conveyance is not effective to pass the legal estate but operates as a declaration that the land is held in trust for the minor or minors (or if he purports to convey it to the minor or minors in trust for any persons, for those persons): see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1, PARA 1(1); and SETTLEMENTS vol 42 (Reissue) PARA 677. Prior to 1 January 1997, where a minor became beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute, his interest was deemed to be comprised in a settlement: see the Settled Land Act 1925 s 1(1)(ii)(d); and SETTLEMENTS vol 42 (Reissue) PARA 677.

7 Ie mental disorder within the meaning of the Mental Health Act 1983 s 1 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 402); see the Administration of Estates Act 1925 s 41(1) proviso (ii).

8 For the meaning of 'property' see PARA 4 note 4 ante.

9 Administration of Estates Act 1925 s 41(1) proviso (ii) (amended by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and the Mental Health Act 1983 s 148, Sch 4 para 7). As to the appointment of a litigation friend see CPR Pt 21. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

10 Administration of Estates Act 1925 s 41(1) proviso (iv) (amended by the Mental Health Act 1959 Sch 7 Pt I).

UPDATE

574 Consents required: absolute interests

TEXT AND NOTES 9, 10--1925 Act s 41(1) proviso (ii), (iv) further amended and 1983 Act Sch 4 para 7 repealed: Mental Capacity Act 2005 Sch 6 para 5(2), Sch 7.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(i) Statutory Power/575. Consents required: settled legacies.

575. Consents required: settled legacies.

An appropriation of property¹ made in respect of a settled legacy, share or interest² requires the consent of either the trustee, if any (not being also the personal representative), or of the person who may for the time being be entitled to the income³.

If the person entitled to the income is a minor or a person incapable by reason of mental disorder⁴ of managing his property and affairs, an appropriation for his benefit requires the consent of his parent or parents, testamentary or other guardian or receiver⁵.

If, independently of the personal representative⁶, there is no trustee of a settled legacy, share or interest, and no person of full age and capacity entitled to its income⁷, no consent is required to the appropriation, provided the appropriation is of an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust⁸.

No consent, save that of a trustee, if any, of a settled legacy, share or interest, is required on behalf of a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time⁹.

1 For the meaning of 'property' see PARA 4 note 4 ante.

2 'Settled legacy, share or interest' includes any legacy, share or interest to which a person is not absolutely entitled in possession at the date of the appropriation, and includes an annuity: Administration of Estates Act 1925 s 41(8). For the meaning of 'possession' for these purposes see PARA 441 note 8 ante. As to settlements see generally SETTLEMENTS.

3 Ibid s 41(1) proviso (ii)(b). For the meaning of 'income' see PARA 558 note 1 ante.

4 Ie mental disorder within the meaning of the Mental Health Act 1983 s 1 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 402): see the Administration of Estates Act 1925 s 41(1) proviso (ii) (as amended: see note 5 infra).

5 Ibid s 41(1) proviso (ii) (amended by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and the Mental Health Act 1983 s 148, Sch 4 para 7). If no receiver has been appointed, then, if the appropriation is of an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, no consent is required: Administration of Estates Act 1925 s 41(1)(iv) (amended by the Mental Health Act 1959 Sch 7 Pt I). The county court has jurisdiction under the Administration of Estates Act 1925 s 41(1) proviso (ii) (as amended) where the estate in respect of which the application is made does not exceed in amount or value the county court limit: s 41(1A) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt III para 13). As to the county court limit see PARA 275 note 3 ante.

6 For the meaning of 'personal representative' see PARA 4 ante.

7 For the meaning of 'income' see PARA 558 note 1 ante.

8 Administration of Estates Act 1925 s 41(1) proviso (v).

9 Ibid s 41(1) proviso (iii).

UPDATE

575 Consents required: settled legacies

TEXT AND NOTE 5--1925 Act s 41(1) proviso (ii) further amended and 1983 Act Sch 4 para 7 repealed: Mental Capacity Act 2005 Sch 6 para 5(2), Sch 7.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(i) Statutory Power/576. Effect of appropriation under statutory power.

576. Effect of appropriation under statutory power.

Any property¹ duly appropriated under the statutory power of appropriation is from then on to be treated as an authorised investment and may be retained or dealt with accordingly².

The appropriation binds all persons interested in the property of the deceased whose consent is not requisite to the appropriation³.

Where an appropriation is made in respect of a settled legacy, share or interest⁴, the property appropriated remains subject to all trusts and powers of leasing, disposition and management or varying investments which would have been applicable to it or to the legacy, share or interest in respect of which the appropriation is made, if no such appropriation had been made⁵.

If after any real estate has been appropriated in purported exercise of the foregoing statutory powers⁶ the person to whom it was conveyed disposes of it or any interest in it, then, in favour of a purchaser⁷, the appropriation is deemed to have been made in accordance with the statutory power and after all requisite consents, if any, had been given⁸.

The personal representative⁹ may give effect to an appropriation by any conveyance¹⁰ including an assent¹¹.

1 For the meaning of 'property' see PARA 4 note 4 ante.

2 Administration of Estates Act 1925 s 41(2). As to authorised investments for trust funds see TRUSTS vol 48 (2007 Reissue) PARA 1012 et seq.

3 Ibid s 41(4). As to the consents required see PARAS 574-575 ante.

4 For the meaning of 'settled legacy, share or interest' see PARA 575 note 2 ante.

5 Administration of Estates Act 1925 s 41(6) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3, PARA 6(1),(3)).

6 I.e. the powers conferred by the Administration of Estates Act 1925 s 41 (as amended) (see PARAS 573-575 ante): see s 41(7).

7 For the meaning of 'purchaser' for these purposes see PARA 267 note 4 ante.

8 Administration of Estates Act 1925 s 41(7).

9 For the meaning of 'personal representative' see PARA 4 ante.

10 For the meaning of 'conveyance' see PARA 267 note 1 ante.

11 Administration of Estates Act 1925 s 41(3).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(i) Statutory Power/577. Valuation.

577. Valuation.

For the purposes of the statutory power of appropriation the personal representative¹ may ascertain and fix the value of the respective parts of the deceased's real and personal estate² and liabilities as he may think fit, and must employ a duly qualified valuer when necessary³. The value of assets appropriated should be the value as at the date of appropriation and not as at the date of death⁴.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 For the meaning of 'real estate' see PARA 3 note 1 ante.

3 Administration of Estates Act 1925 s 41(3). In *Re Brookes, Brookes v Taylor* [1914] 1 Ch 558 an appropriation of property by a trustee without ascertaining the value of the property at the time of appropriation was held to be a breach of trust. As to stamp duty see PARA 582 post. As to valuers see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

4 *Re Charteris, Charteris v Biddulph* [1917] 2 Ch 379 at 386, CA; *Robinson v Collins* [1975] 1 All ER 321, sub nom *Re Collins, Robinson v Collins* [1975] 1 WLR 309. See also PARA 593 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(ii) Common Law Powers/578. Vested legacies.

(ii) Common Law Powers

578. Vested legacies.

Apart from statute¹, an appropriation in the strict sense of the word by an executor of a specific portion of the assets to answer a vested absolute legacy may, in the absence of a power of appropriation contained in the will, only be made with the consent of a legatee who is sui juris². Where a share of residue is immediately payable the executor may enter into an arrangement with the legatee to take over a particular asset in satisfaction of his legacy either in whole or pro tanto without obtaining the consent of the other residuary legatees; and if the transaction is a fair one, and the legatee does not receive more than his share of the assets, the appropriation is unimpeachable³. A sole personal representative can appropriate in his own favour as beneficiary but such an appropriation would be invalid if made without the consent of the other beneficiaries or the sanction of the court⁴.

Where a legacy is presently vested, but payable in future, the legatee has an absolute right to require the amount of the legacy to be invested by the executor; where that is done it amounts to an appropriation in the strict sense of the word⁵. Where there has been a partial distribution of specific assets by way of appropriation this is regarded as equivalent to a distribution of cash of the same value as those assets at the date of distribution⁶.

1 For the statutory powers of appropriation see PARA 573 et seq ante.

2 *Re Salaman, De Pass v Sonnenthal* [1907] 2 Ch 46; *Re Salomons, Public Trustee v Wortley* [1920] 1 Ch 290. As to vested absolute legacies see WILLS vol 50 (2005 Reissue) 659 et seq.

3 *Re Lepine, Dowsett v Culver* [1892] 1 Ch 210, CA.

4 *Kane v Radley-Kane* [1999] Ch 274, [1998] 3 All ER 753; *Re Bythway, Gough v Dames* (1911) 80 LJ Ch 246 (a sole executor who is one of the beneficiaries cannot appropriate at his own price in satisfaction of a

legacy bequeathed to him shares or securities which have no ascertained market value); cf *Re Richardson, Morgan v Richardson*[1896] 1 Ch 512.

5 *Re Hall, Foster v Metcalfe*[1903] 2 Ch 226 at 231, CA. See also *Phipps v Annesley* (1740) 2 Atk 57 at 58; *Johnson v Mills* (1749) 1 Ves Sen 282.

6 *Re Richardson, Morgan v Richardson*[1896] 1 Ch 512 at 516; *Re Gollin's Declaration of Trust, Turner v Williams*[1969] 3 All ER 1591, [1969] 1 WLR 1858.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(ii) Common Law Powers/579. Contingent legacies.

579. Contingent legacies.

Where a legacy is contingent¹, and by the will part of the income arising from the legacy is to go to the legatee before the happening of the contingency, it may be properly inferred that the testator intended a fund to be set apart and invested to answer the legacy. The executor has, in such a case, power to set apart and invest a sum of money to carry out his testator's intentions². Where, however, no interest is directed to be paid on it in the meantime, the executor has no power to appropriate a fund to satisfy the legacy³ in the absence of a direction in the will to appropriate and set aside a fund⁴, nor can the legatee require such an appropriation to be made⁵. The executor may, however, set aside a sum amply sufficient to answer the legacy, invest it, and then proceed to distribute the residue without rendering himself personally liable to make good the loss if it should subsequently turn out that the sum so retained was not sufficient to answer the legacy⁶.

1 As to contingent legacies after 1925 see PARA 502 ante. See also TRUSTS vol 48 (2007 Reissue) PARA 747.

2 *Re Hall, Foster v Metcalfe* [1903] 2 Ch 226 at 233, CA. See also *Green v Pigot* (1781) 1 Bro CC 103.

3 *Re Hall, Foster v Metcalfe* [1903] 2 Ch 226 at 233, CA. See also *Green v Pigot* (1781) 1 Bro CC 103.

4 See *Re Oswald, Oswald v Oswald* (1919) 64 Sol Jo 242.

5 *Re Hall, Foster v Metcalfe* [1903] 2 Ch 226 at 235, CA. See also *Webber v Webber* (1823) 1 Sim & St 311; *King v Malcott* (1852) 9 Hare 692 at 696.

6 *Re Hall, Foster v Metcalfe* [1903] 2 Ch 226 at 233, CA. In *Re Rivers, Pullen v Rivers* [1920] 1 Ch 320 a sum invested and set aside by order of the court to provide for an annuity proved insufficient to pay a legacy payable on the death of the annuitant. The residuary legatees, who had obtained payment of various sums under court orders of which the pecuniary legatee had not had notice, were held liable to make good the deficiency in the sum available for the pecuniary legatee.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(ii) Common Law Powers/580. Settled legacies.

580. Settled legacies.

Executors who are also trustees of settled shares of residue may appropriate specific assets, provided they are investments of an authorised nature, to the settled shares¹. They may

appropriate to one share without making a corresponding appropriation to the other shares². A power in a will to retain property forming part of the deceased's estate unconverted throughout the trust is equivalent to a power to invest in that class of property, and constitutes that class of property an authorised investment for the purpose of appropriation to a settled share³. In the case of a trust created by the will of a person dying before 1 January 1997 a mere power to postpone conversion⁴ following a trust for sale⁵ does not have that effect⁶.

1 *Re Waters, Preston v Waters* [1889] WN 39; *Re Richardson, Morgan v Richardson* [1896] 1 Ch 512. As to settlements see generally SETTLEMENTS.

2 *Re Nickels, Nickels v Nickels* [1898] 1 Ch 630.

3 *Fraser v Murdock* (1881) 6 App Cas 855, HL (stocks and shares); *Re Brooks, Coles v Davis* (1897) 76 LT 771 (shares); *Re Cooke's Settlement, Tarry v Cooke* [1913] 2 Ch 661 (leaseholds); *Re Wragg, Wragg v Palmer* [1919] 2 Ch 58 (freeholds).

4 The doctrine of conversion has been largely abolished (see the Trusts of Land and Appointment of Trustees Act 1996 s 3(1); and PARA 336 ante) except in the case of a trust created by the will of a person dying before 1 January 1997: see s 3(2); and WILLS vol 50 (2005 Reissue) PARA 579. In respect of a trust created or arising before or after that date, where land is held by trustees subject to a trust for sale, the land is no longer regarded as personal property; and where personal property is subject to a trust for sale in order that the trustees may acquire land, the personal property is not regarded as land: s 3(1). See also REAL PROPERTY vol 39(2) (Reissue) PARA 77.

5 In the case of every trust for sale of land created by a disposition, whenever the trust is created or arises, there is to be implied, despite any provision to the contrary made by the disposition, a power for the trustees to postpone sale of the land: see *ibid* s 4(1), (2); and SALE OF LAND vol 42 (Reissue) PARA 609.

6 *Re Craven, Watson v Craven* [1914] 1 Ch 358; *Re Beverly, Watson v Watson* [1901] 1 Ch 681 at 688.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(ii) Common Law Powers/581. Extent and effect of power.

581. Extent and effect of power.

The power of appropriation extends to pure personalty of whatever nature¹, to chattels real² and appears to have applied, in the case of a trust created by the will of a person dying before 1 January 1997 to real estate where there is a trust for sale³ and conversion⁴.

Where an appropriation in the strict sense of the word has been made, all profit or loss, as the case may be, in respect of the appropriated fund goes to or falls upon the legatee⁵.

1 See *Elliott v Kemp* (1840) 7 M & W 306 at 313 (furniture); *Barclay v Owen* (1889) 60 LT 220; *Re Lepine, Dowsett v Culver* [1892] 1 Ch 210, CA (mortgage debt); *Re Richardson, Morgan v Richardson* [1896] 1 Ch 512; *Re Brooks, Coles v Davis* (1897) 76 LT 771 (shares in a brewery company); *Re Nickels, Nickels v Nickels* [1898] 1 Ch 630 (stock); *Re Waters, Preston v Waters* [1889] WN 39 (mortgages and other securities).

2 *Re Beverly, Watson v Watson* [1901] 1 Ch 681.

3 See PARA 580 note 5 ante.

4 *Re Beverly, Watson v Watson* [1901] 1 Ch 681 at 686. As to the abolition of conversion see PARAS 336, 580 note 4 ante.

5 *Burgess v Robinson* (1817) 3 Mer 7 at 9; *Rock v Hardman* (1819) 4 Madd 253; *Kimberley v Tew* (1843) 4 Dr & War 139, 149; *Re Hall, Foster v Metcalfe* [1903] 2 Ch 226, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/6. THE DISTRIBUTION OF ASSETS/(6) APPROPRIATION/(ii) Common Law Powers/582. Stamp duty.

582. Stamp duty.

A transfer of stocks or shares to a pecuniary legatee if executed in pursuance of a power of appropriation under which the consent of the beneficiary is required, is liable to ad valorem stamp duty as a conveyance on sale, since the transaction is contractual in substance¹. Where no such consent is required, the appropriation, unless by deed, will attract no stamp duty² and if made by deed may be certified as exempt³.

1 *Jopling v IRC* [1940] 2 KB 282, [1940] 3 All ER 279; *Dawson v IRC* [1905] 2 IR 69. As to the stamp duty on conveyances see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1027 et seq.

2 See the Administration of Estates Act 1925 s 36(11); and PARA 571 ante. An appropriation of a matrimonial home to a surviving spouse under the Intestates' Estates Act 1952 is not normally liable to ad valorem stamp duty: see PARA 593 note 9 post.

3 Appropriations in or towards the satisfaction of a general pecuniary legacy and appropriations to a surviving spouse on an intestacy are excluded from stamp duty: see the Finance Act 1985 s 84(4), (5); the Stamp Duty (Exempt Instruments) Regulations 1987, SI 1987/516, regs 2, 3, 4, Schedule Category D; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARAS 1083, 1089.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(1) INTRODUCTION/(i) In general/583. Rules of intestate succession.

7. INTESTATE SUCCESSION

(1) INTRODUCTION

(i) In general

583. Rules of intestate succession.

The rules of intestate succession¹ are laid down by statute², and govern the distribution of the residuary estate of intestates³, subject to the court's overriding power in relation to family provision⁴. They apply to all property⁵ of which the deceased owner⁶ died intestate⁷, subject to certain savings⁸.

The old rules of distribution and descent still apply where the deceased died intestate before 1926⁹; where the death intestate occurred after 1925¹⁰ intestate succession is governed by the rules enacted in the Administration of Estates Act 1925 as amended from time to time¹¹.

1 The term 'rules of intestate succession' is used to describe the distributive provisions or trusts established by the Administration of Estates Act 1925 Pt IV (ss 45-52) (as amended) because, since the

assimilation of the rules applicable to real estate and personalty, the distinction between 'distribution' and 'descent' is in the great majority of cases obsolete.

Before 1926 'distribution' was confined to the division of the personal estate of a deceased person among his next of kin. 'Descent' was used to describe the passing of real estate (which in this connection did not include leaseholds or chattels real) by inheritance to the heir: see *Bickley v Bickley* (1867) LR 4 Eq 216 at 220; and Co Litt 237a. 'A descent is a means whereby one doth derive his title to certain lands as heir to some of his ancestors': Co Litt 13b. The Inheritance Act 1833 s 1, now superseded as regards deaths after 1925 but preserved as regards the devolution of entailed interests and for certain other purposes (see PARAS 584 note 4, 632 note 1, 633 note 7 post), defines 'descent' as meaning the title to inherit land by reason of consanguinity, as well where the heir is an ancestor or collateral relation as where he is a child or other issue. It is no longer possible to create entailed interests but existing entailed interests are unaffected: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 119. As to the meaning of 'heir' in a modern will see WILLS vol 50 (2005 Reissue) PARA 628.

2 In the Administration of Estates Act 1925 Pt IV (which had the effect of greatly restricting the class of next of kin who could take under an intestacy), amended, as regards deaths intestate after 1952, by the Intestates' Estates Act 1952 (which further reduced the class of relatives who can take where there is a surviving spouse and no issue); and further amended: (1) as regards deaths intestate after 1966, by the Family Provision Act 1966 ss 1, 9, 10(2), Sch 2; (2) as regards the illegitimate children of a person dying intestate after 1969, by the Family Law Reform Act 1969 ss 3(2), 14(3), (6), which is replaced as regards the illegitimate relations of a person dying on or after 4 July 1988 by the more comprehensive provisions of the Family Law Reform Act 1987 (see further PARA 588 post); and (3) as regards deaths intestate after 1995 by the Law Reform (Succession) Act 1995 (which introduced a 28 day survivorship condition for the spouse of an intestate). The Intestates' Estates Act 1952 increased the amount of the lump sum to which the surviving spouse of a person dying intestate after 1952 was entitled; this was further increased as regards spouses dying intestate after 1966 by the Family Law Reform Act 1966. Since that time the Lord Chancellor has had power to vary the fixed net sum (as it became called) and has exercised that power as regards spouses dying intestate on or after 1 July 1972 by the Family Provision (Intestate Succession) Order 1972, SI 1972/916; as regards spouses dying intestate on or after 16 March 1977 by the Family Provision (Intestate Succession) Order 1977, SI 1977/415; as regards spouses dying intestate on or after 1 March 1981 by the Family Provision (Intestate Succession) Order 1981, SI 1981/255; and as regards spouses dying on or after 1 December 1993 by the Family Provision (Intestate Succession) Order 1993, SI 1993/2906. For the amounts of the lump sum or fixed net sum during the periods to which the provisions apply see PARAS 591 note 11, 592 note 4, 621 post.

The statutory code creates a sort of statutory will for the intestate (*Cooper v Cooper* (1874) LR 7 HL 53 at 66), and many of the distributive problems are similar to those which arise on testate distribution, but the topic has for no obvious other than historical reason always been treated under the heading of executors rather than wills. As regards the question what system of law applies to intestate succession to immovable property and movable property see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 432 et seq.

3 As regards the meaning of the 'residuary estate' of intestates see PARA 557 text and note 2 ante.

4 See the Inheritance (Provision for Family and Dependents) Act 1975 s 1(1) (as amended), which applies to deaths on or after 1 April 1976 (ss 1(1), 27(3)); and PARA 665 et seq post. The Inheritance (Family Provision) Act 1938 (repealed) was applied to intestacies as from 1 January 1953 by the Intestates' Estates Act 1952 s 7(a) (repealed). As to the dangers of distributing an estate within six months of the grant see PARA 477 ante.

⁵ *Re Ford, Ford v Ford* [1902] 2 Ch 605, CA. The rules of intestate succession do not, however, govern the descent of entailed interests: see PARA 631 post. See also note 1 supra.

⁶ A person entitled to exercise a general power of appointment by will is not treated for this purpose as an owner of the property subject to the power, and if he fails to exercise his power the property devolves in accordance with the provisions of the instrument creating the power: see POWERS vol 36(2) (Reissue) PARA 220. If the power is exercised by will the property becomes part of the estate: Administration of Estates Act 1925 s 55(3).

⁷ See *ibid* s 33 (as amended) (see PARA 555 et seq ante), and the definition of 'intestate' in s 55(1)(vi) by which intestate includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate: see PARA 555 note 1 ante. As to the application of the Administration of Estates Act 1925 to partial intestacies see PARAS 585, 615 et seq post.

⁸ The cases in which former rules may still apply are stated in PARAS 584, 631-635 post.

⁹ See the Administration of Estates Act 1925 ss 54, 58(2) (repealed).

¹⁰ See *ibid* s 58(2) (repealed).

¹¹ See note 2 supra.

UPDATE

583 Rules of intestate succession

NOTE 2--As regards spouses dying on or after 1 February 2009 see the Family Provision (Intestate Succession) Order 2009, SI 2009/135.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(1) INTRODUCTION/(i) In general/584. Extent of operation of the old law.

584. Extent of operation of the old law.

The old rules of descent were in general abolished as regards deaths after 1925¹ but have been indefinitely retained for certain purposes by means of statutory savings². Accordingly, an entailed interest created before 1997³ devolves in the same manner as an estate tail of the same kind descended before 1926, except that in all cases the entailed interest devolves as an equitable interest⁴. A person entitled to take beneficially as an heir, either general or special, of a deceased person may be ascertained by reference to the old law⁵.

The old rules may still apply to the descent of the freehold estate of a person of unsound mind or defective living and of full age on 1 January 1926⁶, and for determining the devolution of property of a minor dying after 1925 and before 1997 unmarried where the minor had or was deemed to have had an entailed interest⁷. Moreover, partial intestacy may occur after 1925 in respect of the estate of a person who died before 1926, and in such cases the old rules of descent and distribution will still apply⁸.

1 Administration of Estates Act 1925 s 45(1)(a). As to the abolition of escheat see s 45(1)(d); as to the abolition of tenancy by the curtesy and of dower and freebench see s 45(1)(b), (c). See further REAL PROPERTY vol 39(2) (Reissue) PARAS 157 et seq, 254. Nothing in s 45 affects the descent or devolution of an entailed interest: s 45(2). Entailed interests cannot be created after 1996: see PARA 583 note 1 ante.

2 See *ibid* s 51 (as amended).

3 As to entailed interests see note 1 *supra*.

4 See the Law of Property (Amendment) Act 1924 s 9, Sch 9 (preserving, in relation to the devolution of entailed interests as equitable interests, the Inheritance Act 1833, as amended by the Law of Property Amendment Act 1859 s 19; for the enactments preserved see PARA 637 et seq post); Law of Property Act 1925 s 130(4); Administration of Estates Act 1925 ss 45(2), 51(4) (s 51(4) is repealed by the Trusts of Land and Appointment of Trustees Act 1996, but the repeal does not affect existing entailed interests; see further PARA 631 post). As to descent of an estate tail before 1926 see PARA 660 post. As to the operation of the legislation of 1925 upon an estate tail in an undivided share in land to turn it into an absolute interest in personalty see *Re Price* [1928] Ch 579. Apparently where land is subject to custom, upon a death after 1925, the descent must be traced to the heir at common law of the last purchaser, the custom being totally ignored, and not by following the custom up to 1926 and then the common law: *Re Price* *supra*. As to the abolition of customary descent on 1 January 1926 see PARA 661 et seq post.

5 Administration of Estates Act 1925 s 51(1). See PARA 632 post. As to the construction of the word 'heir' in a will see WILLS vol 50 (2005 Reissue) PARA 628.

6 *Ibid* s 51(2) (amended by the Mental Treatment Act 1930 s 20(5); the Mental Health Act 1959 s 149(2), Sch 8; and the Mental Health Act 1983 s 148, Sch 5 para 29). See also PARA 633 post.

7 Administration of Estates Act 1925 s 51(3) (as originally enacted). See PARA 634 post. The effect of this provision is that the property in question reverted to the settlor if the minor died without having been married and without having attained his majority. If the minor died before 4 April 1988 this would be so even if he had illegitimate children: see the Family Law Reform Act 1969 s 14(5) (as originally enacted). If the minor died on or after 4 April 1988 the illegitimate issue of the minor would be entitled under the entail: see the Family Law Reform Act 1987 ss 1, 18; and PARAS 588, 635 post. In the case of a minor dying on or after 1 January 1997 the Administration of Estates Act 1925 s 51(3) does not apply unless the minor dies not only without having been married but also without issue; in such a case the minor is deemed to have had a life interest in the property in question instead of an entailed interest: see s 51(3) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25, Sch 3 para 6, Sch 4).

⁸ See *Re McKee, Public Trustee v McKee* [1931] 2 Ch 145 at 147, CA. For an example of a partial intestacy occurring after the termination of a trust for accumulation see *Re Walpole, Public Trustee v Canterbury* [1933] Ch 431, where the testatrix died in 1901. See also the Intestates Estates Act 1884 s 7 (repealed as respects deaths after 1925); and PARA 655 post.

UPDATE

584 Extent of operation of the old law

NOTE 7--Administration of Estates Act 1925 s 51(3) amended: Civil Partnership Act 2004 Sch 4 para 11.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(1) INTRODUCTION/(i) In general/585. Intestacy.

585. Intestacy.

Intestacy may be either total or partial¹. Total intestacy occurs where a person makes no effective² testamentary disposition of any of the property³ of which he is competent to dispose by will. Partial intestacy⁴ occurs where the testator's will, though partly effective, either: (1) altogether fails to dispose of some specific property of his; or (2) having purported to dispose of all his property, has failed to dispose effectively of some interest which has arisen in consequence of the will, as for instance a reversionary interest⁵ or a life interest⁶. In the first case the failure occurs at the date of death, whereas in the second it may occur at the date of death or at some later date. In the first case where the testator died after 1925 and before 1997⁷ the undisposed of estate was held (subject to the provisions of the will⁸) on the statutory trust for sale⁹; in the case of a testator dying after 1996 his undisposed estate is held in trust by his personal representatives with power to sell it¹⁰. This is not so, however, in the second case, where (subject to the provisions of the will) certain special statutory provisions¹¹ applicable only to such a case govern the administration¹².

¹ For the general meaning of 'intestate' for the purposes of the Administration of Estates Act 1925 see PARA 555 note 1 ante.

² Accordingly a person dies intestate even if he has left a will where the will is ineffective: *Re Ford, Ford v Ford* [1902] 2 Ch 605, CA; *Re Cuffe, Fooks v Cuffe* [1908] 2 Ch 500. Where the will makes no disposition of any beneficial interest, the mere appointment of an executor does not constitute a disposition of the estate, for the repeal of the Executors Act 1830 has not revived the old rule by which an executor was treated in such a case as taking the testator's personal estate beneficially: *Re Skeats, Thain v Gibbs* [1936] Ch 683, [1936] 2 All ER 298.

³ As to entailed property see PARA 631 post.

⁴ The Statute of Distribution (1670) (repealed as respects deaths after 1925) did not apply to a partial intestacy nor even where the only effective part of the will was the appointment of executors (*Re Roby, Howlett*

v Newington [1908] 1 Ch 71, CA), but the courts of equity applied the statute by analogy (*Vachell v Jefferys* (1701) Prec Ch 170; revsd on appeal sub nom *Vachell v Breton* (1706) 5 Bro Parl Cas 51, HL; *Re Roby, Howlett v Newington* supra). Nor did the Intestates' Estates Act 1890 (repealed as respects deaths after 1925), apply to a partial intestacy. For the Intestates Estates Act 1884 s 7 (repealed as respects deaths after 1925) see PARA 655 post.

5 See *Re McKee, Public Trustee v McKee* [1931] 2 Ch 145, CA. It seems that if an estate were given upon trust to convert and to stand possessed of the net proceeds upon trust for two persons in equal shares and one of the beneficiaries predeceased the testator, the case would also fall within the second category mentioned in the text: *Re McKee, Public Trustee v McKee* supra at 165-166.

6 See *Re Plowman, Westminster Bank Ltd v Plowman* [1943] Ch 269, [1943] 2 All ER 532. See also *Re Thorner, Crabtree v Thorner* [1937] Ch 29, [1936] 2 All ER 1594, CA; and PARA 618 note 6 post.

7 See PARA 584 text and note 7 ante.

8 See the Administration of Estates Act 1925 s 33(7), which provides that, where the deceased leaves a will s 33 (as amended) is to have effect subject to the provisions contained in the will. As to the provisions which are to be taken into account cf para 618 text and note 5 post.

9 See *ibid* s 33 (as originally enacted); and PARAS 555-556 ante. See also *Re McKee, Public Trustee v McKee* [1931] 2 Ch 145 at 160, 165, CA; *Re Plowman, Westminster Bank Ltd v Plowman* [1943] Ch 269 at 274, [1943] 2 All ER 532 at 535.

10 See the Administration of Estates Act 1925 s 33(1) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 5).

11 In those contained in the Administration of Estates Act 1925 s 49 (as amended (in relation to deaths after 1952) by the Intestates' Estates Act 1952 ss 3, 4, and (in relation to deaths after 1995) by the Law Reform (Succession) Act 1995): see PARA 615 et seq post. These provisions are expressly to apply where any person dies leaving a will effectively disposing of part of his property (see the Administration of Estates Act 1925 s 49(1) (as amended)); 'property' is, however, defined to include any interest in real or personal property (see s 55(1)(xvii); and PARA 4 note 4 ante); and see *Re McKee, Public Trustee v McKee* [1931] 2 Ch 145 at 166, CA.

12 See *Re McKee, Public Trustee v McKee* [1931] 2 Ch 145, CA; *Re Plowman, Westminster Bank Ltd v Plowman* [1943] Ch 269, [1943] 2 All ER 532.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(1) INTRODUCTION/(ii) Capacity to take under an Intestacy/586. Culpable homicide.

(ii) Capacity to take under an Intestacy

586. Culpable homicide.

A person who unlawfully kills another may not benefit under the will or intestacy of his victim unless he was of unsound mind at the time of the killing¹. If, however, the degree of unsoundness is insufficient to procure a verdict of 'guilty but insane' or 'not guilty by reason of insanity'² and the killer is convicted of manslaughter by reason of diminished responsibility³ he has been convicted of a crime and may not benefit from it⁴.

1 See WILLS vol 50 (2005 Reissue) PARAS 341-342. As to the disposition of the share which the killer would normally have taken on the death of the victim see *Re Callaway, Callaway v Treasury Solicitor* [1956] Ch 559, [1956] 2 All ER 451 (daughter killed mother; daughter sole beneficiary under mother's will; daughter and son would normally have been entitled on mother's intestacy; son took beneficial interest in whole estate to the exclusion of any claim by the Crown to bona vacantia). As to the right to a grant see PARA 160 ante.

As to who should take the estate where the person primarily entitled under the intestacy rules is disqualified see *Re Scott, Widdows v Friends of the Clergy Corp'n* [1975] 2 All ER 1033, [1975] 1 WLR 1260 (where both

members of the class primarily entitled disclaimed and it was held that the estate went to the next following class under the Administration of Estates Act 1925 s 46 (as amended)); and *Re DWS and EHS, TWGS v JMG* (5 March 1999) Lexis, Enggen Library, Cases File (in which a father died intestate having been murdered by his only son; he was survived by the son, his son's son and a sister; it was held that the son's son did not take, because he was not issue of the child of the intestate who had predeceased the intestate, and that the sister did take, notwithstanding that the intestate left issue him surviving (this decision is under appeal)).

2 These special verdicts both amount to an acquittal: *Re Giles, Giles v Giles*[1972] Ch 544 at 552, [1971] 3 All ER 1141 at 1145 per Pennycuik V-C.

3 See the Homicide Act 1957 s 2; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 96.

4 *Re Giles, Giles v Giles*[1972] Ch 544 at 552, [1971] 3 All ER 1141 at 1145 per Pennycuik V-C; *Dunbar v Plant*[1997] 4 All ER 289, CA. See also PARA 160 ante. See further WILLS vol 50 (2005 Reissue) PARAS 341-342.

UPDATE

586 Culpable homicide

NOTE 1--See *Re DWS; Re EHS; TWGS (a child) v G*[2001] 1 All ER 97, CA (son killed parents; son's child not entitled to inherit under grandparents' intestacy).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(1) INTRODUCTION/(ii) Capacity to take under an Intestacy/587. Legitimate children.

587. Legitimate children.

At common law a person is in principle entitled to take under the rules of intestacy only if he is legitimate and is able to establish kinship with the intestate exclusively through persons who are legitimate. The common law rule has now been largely negated by statute¹. The concept of legitimacy has itself, however, been modified and extended by statute. In the case of a person dying intestate on or after 29 October 1959² the child of a void marriage whenever born is treated as the legitimate child of his parents if they or either of them reasonably believed that they were validly married at the date of the act of intercourse resulting in the birth or at the time of the celebration of the marriage, if later³. This rule applies only if the father of the child was domiciled in England and Wales at time of the birth or, if he dies before the birth, if he was so domiciled immediately before his death⁴.

A person born on or after 4 April 1988⁵ to a married woman as the result of artificial insemination with the semen of a person other than the husband is also now treated as the legitimate child of the marriage unless it is proved to the satisfaction of the court that the husband did not consent⁶. These provisions were replaced with effect from 1 August 1991 by similar but more comprehensive provisions catering for children born on or after that date as a result of artificial insemination or in vitro fertilisation⁷.

1 As to illegitimate and legitimated children see PARA 588 post; and as to adopted children see PARA 589 post.

2 Ie the commencement date of the Legitimacy Act 1959: see s 6(3) (repealed).

3 See *ibid* s 2(1), (4) (repealed); replaced by the Legitimacy Act 1976 s 1 (as amended) with effect from 22 August 1976 (see s 12(2)); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 127. Any relationship

between two persons must now be construed in accordance with the Family Law Reform Act 1987 s 1: see PARA 588 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125.

4 See the Legitimacy Act 1976 s 1(2) (replacing the identical provisions of the Legitimacy Act 1959 s 2(2) (repealed)); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 127. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

5 See the commencement date of the Family Law Reform Act 1987 s 27: see s 34(2); the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125.

6 See the Family Law Reform Act 1987 s 27(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 101. For this purpose a void marriage is treated as valid if both or either of the parties reasonably believed that the marriage was valid, it being presumed unless the contrary is shown that one of the parties so believed at the time that the marriage was valid: see s 27(2); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 101.

7 See the Human Fertilisation and Embryology Act 1990 ss 27, 28, 29; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 102 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESATE SUCCESSION/(1) INTRODUCTION/(ii) Capacity to take under an Intestacy/588. Illegitimate and legitimated children.

588. Illegitimate and legitimated children.

In the case of a death before 1970¹ illegitimate children were not 'issue' within the meaning of the statutory provisions relating to succession on intestacy² and were in general precluded from taking as such under an intestacy³.

Legitimated children might share in the estate of an intestate dying after the date of legitimation if they had been legitimated under English law or (except in the case of real property where the old law of descent still applied) if their legitimation under foreign law was recognised in England⁴.

In the case of a death after 1969⁵ and before 4 April 1988, the provisions as to intestate succession⁶ had effect as if any reference to the issue of the intestate included a reference to any illegitimate child of his and to the issue of any such child; any reference to the child or children of the intestate included a reference to any illegitimate child or children of his; and in relation to an intestate who was an illegitimate child any reference to the parent, parents, father or mother of the intestate were a reference to his natural parent, parents, father or mother⁷. The parents of an illegitimate child were given the same rights of succession as they would have had if the child had been born legitimate save that the father was presumed to have predeceased the child unless the contrary was shown⁸. The statutory trusts were not, however, varied so as to include all persons who, but for their own ancestor's illegitimacy, would have been included in the next of kin. The only change was to include in the next of kin of an intestate his own illegitimate children and their legitimate issue⁹.

In the case of a death on or after 4 April 1988 the foregoing rules do not apply and have been replaced by the general principle of construction contained in the Family Law Reform Act 1987¹⁰, which provides that in enactments passed and instruments made after that date¹¹ references (however expressed) to any relationship between two persons are, unless the contrary intention appears, to be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time¹². This general principle of construction is expressly extended to the statutory provisions relating to succession

on intestacy¹³. For this purpose, however, an illegitimate child is presumed not to have been survived by his father or by any person related to him only through his father unless the contrary is shown¹⁴.

1 See the Family Law Reform Act 1969 s 14(9) (repealed).

2 Ie the Administration of Estates Act 1925 s 46 (amended by the Intestates' Estates Act 1952 s 1, and reproduced in amended form in Sch 1 (see s 4); and amended by the Family Provision Act 1966 s 1): see PARA 591 et seq post. After 1926, however, an illegitimate child or his issue could take on the death of his mother intestate and without leaving legitimate issue, and the mother of an illegitimate child who died intestate and without having been legitimated was entitled to take as if the child had been born legitimate if she was his only surviving parent: see the Legitimacy Act 1926 s 9(1), (2) (repealed); and the Legitimacy Act 1959 s 1(2) (repealed).

3 See *Re Makein, Makein v Makein* [1955] Ch 194 at 201, [1955] 1 All ER 57 at 59 per Harman J; and cf para 591 post. As to the principle that references to 'children' in a will prima facie refer to legitimate children see *Hill v Crook* (1873) LR 6 HL 265; and WILLS vol 50 (2005 Reissue) PARA 638. As to the principle that an illegitimate child was not entitled to claim under the Inheritance (Family Provision) Act 1938 (repealed), as extended by the Intestates' Estates Act 1952 (repealed) see *Re Makein, Makein v Makein* supra. As to the provisions of the Inheritance (Provision for Family and Dependents) Act 1975 see PARA 665 et seq post.

4 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 336 et seq.

5 See note 1 supra.

6 Ie the Administration of Estates Act 1925 Pt IV (ss 45-52) (as amended).

7 See the Family Law Reform Act 1969 s 14(3) (repealed).

8 See *ibid* s 14(2), (4) (repealed).

9 See PARA 158 note 6 ante. As to succession by illegitimate persons generally see WILLS vol 50 (2005 Reissue) PARA 638 et seq.

10 See the Family Law Reform Act 1987 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125.

11 Ie the date of the coming into force of *ibid* s 1: see the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125.

12 Family Law Reform Act 1987 s 1(1).

13 *Ibid* s 18(1).

14 *Ibid* s 18(2).

UPDATE

588 Illegitimate and legitimated children

TEXT AND NOTE 14--See further Family Law Reform Act 1987 s 18(2A) (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 25(2)).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(1) INTRODUCTION/(ii) Capacity to take under an Intestacy/589. Adopted children.

589. Adopted children.

Where at any time after the making of an adoption order in England or Wales¹ the adopter or the adopted person or any other person dies intestate his property devolves as if, where the adopters are a married couple, the adopted person had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnised), and, in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter); and he is treated as if he were not the child of any person other than the adopters or adopter². Any relative of any degree (other than the adoptive father and adoptive mother) under an adoptive relationship may be referred to as an adoptive of that degree³.

¹ See the Adoption Act 1976 ss 39 (as amended), 42, 46(4), replacing in relation to deaths after 1975 the identical provisions of the Children Act 1975 s 8(9), (10), Schs 1, 2 (all repealed); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 376 et seq. The corresponding provisions of the Adoption Act 1958 s 16(4) were repealed in relation to dispositions of property after 1975 by the Children Act 1975 s 108(1)(b), Sch 4 Pt I save in relation to Northern Ireland: see s 109(2) (repealed). Where a child is adopted under a foreign order which is recognised in England, his succession rights would seem to be those which he would have enjoyed had the adoption taken place in England: *Re Valentine's Settlement, Valentine v Valentine* [1965] Ch 831, [1965] 2 All ER 226, CA. Different principles may apply if succession is governed by foreign law: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 432 et seq.

² See the Adoption Act 1976 s 39(1), (2); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 376. Before 1 January 1997, references to dispositions of property included references to a disposition by the creation of an entailed interest: see s 46(5) (repealed as from that date by the Trusts of Land and Appointment of Trustees Act 1996 s 25, Sch 4). Entailed interests can no longer be created: see PARA 583 note 1 ante. The Adoption Act 1958 s 16(1) (repealed) formerly applied to exclude property subject to an entailed interest under a disposition made before the adoption order, and that application is not affected in relation to dispositions of property made before 1976: see the Adoption Act 1976 s 42(1).

³ See *ibid* s 41; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 376.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(1) INTRODUCTION/(ii) Capacity to take under an Intestacy/590. Protection of personal representatives.

590. Protection of personal representatives.

Personal representatives are under a strict duty under the general law to distribute the estate to the persons entitled to it and if they mistakenly pay away trust moneys to the wrong party they are accountable to the party entitled, whether or not the mistake was made in good faith¹. The strict rule has been modified by statute. If the personal representatives of a person dying after 1969 at any time before 4 April 1988² distribute property among persons entitled without having ascertained that there is no person who is or may be entitled by virtue of the provisions of the Family Law Reform Act 1969 relating to the property rights of illegitimate children³, they were not liable to any such person of whose claim they had no notice at the time of the distribution, but this provision did not prejudice the right of any such person to follow the property or any property representing it, into the hands of any person, other than a purchaser, who might have received it⁴. A similar exception from the general rule has been introduced in relation to adopted and legitimated children. The personal representatives of a person dying on or after 1 January 1976 are relieved from any duty on distributing property to make inquiries whether any person is adopted or is illegitimate or has been adopted by one of his natural parents and could be legitimated (or if deceased be treated as legitimated)⁵.

The exception for illegitimate children has, however, now been abolished. Personal representatives who distribute property on or after 4 April 1988 are no longer free from liability

if they distribute without having ascertained that no person whose parents were not married to each other at the time of his birth, or who claims through such a person, is or may be entitled to an interest in the property⁶.

1 See PARA 803 post. Personal representatives may protect themselves by seeking an order of the court authorising a distribution on a certain footing (*Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723) or they may protect themselves by advertisement (see the Trustee Act 1925 s 27 (as amended) (see PARAS 382-383 ante); and see *Re Aldhous* [1955] 2 All ER 80, [1955] 1 WLR 459). A personal representative who acts honestly and reasonably and who fairly ought to be excused for breach of trust and for omitting to obtain the directions of the court in the matter in which he has committed such breach may be relieved either wholly or partly from personal liability: see the Trustee Act 1925 ss 61, 68(1) PARA (17); and TRUSTS vol 48 (2007 Reissue) PARA 1123.

2 See notes 3, 5 infra.

3 Ie by virtue of the Family Law Reform Act 1969 s 14 (repealed with respect to persons dying on or after 4 April 1988) (which provided for succession to and from illegitimate persons on an intestacy: see PARA 588 ante) and ss 15, 16 (repealed) (see WILLS vol 50 (2005 Reissue) PARA 643).

4 See the Children Act 1975 s 8, Sch 1 para 15(1) (repealed), which has now been replaced by the Adoption Act 1976 s 45(1) and the Legitimacy Act 1976 s 7(1): see PARA 478 ante.

5 See the Children Act 1975 Sch 1 para 15(1) (repealed); and note 4 supra.

6 The Family Law Reform Act 1987 s 17 was repealed with effect from 4 April 1988 by the Family Law Reform Act 1987 s 20. Since this repeal does not extend to persons who are adopted or legitimated or claim through persons who are adopted or legitimated, persons who are illegitimate or claim through persons who are illegitimate are better protected than they are in cases where trust assets are misdistributed.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/591. Surviving spouse's rights where there is no issue.

(2) DEATHS INTESTATE AFTER 1952

(i) Right of Surviving Spouse

591. Surviving spouse's rights where there is no issue.

If the intestate¹ dies on or after 1 January 1996 and leaves a husband or wife who survives the intestate by the period of 28 days² and leaves no issue³, parent⁴, brother or sister of the whole blood or issue of a brother or sister of the whole blood⁵, the whole residuary estate is held in trust for the surviving spouse absolutely⁶. In the case of an intestate dying before 1 January 1996 the surviving spouse's entitlement is contingent merely on having survived the intestate⁷.

If the intestate leaves no issue but leaves a parent, brother or sister of the whole blood or issue of a brother or sister of the whole blood⁸ the surviving spouse takes (regardless of their value⁹) the personal chattels¹⁰, a fixed net sum¹¹ absolutely¹², subject (in the case of an intestate dying on or after 1 January 1996) to surviving the intestate by the period of 28 days beginning with the day on which the intestate died¹³, free of inheritance tax and costs, and with interest primarily payable out of income¹⁴ at 6 per cent per annum¹⁵ until paid or appropriated and, subject to providing for that sum and the interest on it, the residuary estate is held as to one-half in trust for the surviving spouse absolutely¹⁶.

1 For the meaning of 'intestate' see PARA 555 note 1 ante.

2 See the Administration of Estates Act 1925 s 46(2A) (added with effect from 1 January 1996 by the Law Reform (Succession) Act 1995 s 1(1), (3)). Where the intestate's husband or wife survived the intestate but died before the end of the period of 28 days beginning with the day on which the intestate died, the Administration of Estates Act 1925 s 46 (as amended) has effect as respects the intestate as if the husband or wife had not survived the intestate: s 46(2A) (as so added).

3 As to the meaning of 'issue' see PARA 588 ante. It seems necessary that 'no issue' must here be read, in the first instance, as an absolute failure of issue at the death of the intestate, and not as 'no issue who attain an absolutely vested interest' under the statutory trusts set out in PARAS 603-604 post; cf para 608 text and note 5 post.

4 Since the Family Law Reform Act 1969 the old presumptions against the inclusion of illegitimate relationships on an intestacy have been reversed. See generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125 et seq. As to the presumption on death before 1970 and as to legitimation see PARA 588 ante. As to adoption see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 323 et seq. 'Parent' does not of itself include step-parents or parents by marriage.

5 References to the intestate leaving or not leaving a member of the class consisting of brothers or sisters of the whole blood of the intestate and issue of such brothers or sisters are construed as references to the intestate leaving or not leaving a member of that class who attains an absolutely vested interest: Administration of Estates Act 1925 s 47(4) (added by the Intestates' Estates Act 1952 s 1(3)(c)).

6 Administration of Estates Act 1925 s 46(1)(i), Table para (1) (substituted by the Intestates' Estates Act 1952 s 1(2)). The residuary estate consists of the real and personal estate of the intestate. For the meaning of 'real and personal estate' see the Administration of Estates Act 1925 s 52 (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 4).

7 See the Administration of Estates Act 1925 s 46(1)(i), Table para (1) (as substituted: see note 6 supra). For this purpose where the intestate and the intestate's spouse died in circumstances rendering it uncertain which of them survived the other, the presumption contained in the Law of Property Act 1925 s 184 that for all purposes affecting title to property the younger of two or more persons dying in such circumstances is deemed to survive (see PARA 146 ante) was excluded with the consequence that the intestate's spouse, even if younger, was not deemed to survive and did not therefore take any interest in the intestate's estate under the intestacy rules: see the Administration of Estates Act 1925 s 46(3) (added by the Intestates' Estates Act 1952 s 1(4)). The introduction of the Administration of Estates Act 1925 s 46(2A) appears to have deprived s 46(3) (as added) of any effect.

8 See note 5 supra.

9 See *Crispin's Will Trusts, Arkwright v Thurley*[1975] Ch 245 at 248, [1974] 3 All ER 772, CA.

10 'Personal chattels' means carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors, and consumable stores, but not any chattels used at the death of the intestate for business purposes, nor money or securities for money: Administration of Estates Act 1925 s 55(1)(x). A pleasure yacht (*Re Chaplin, Royal Bank of Scotland v Chaplin*[1950] Ch 507, [1950] 2 All ER 155), racehorses (*Re Hutchinson, Holt v Hutchinson*[1955] Ch 255, [1955] 1 All ER 689), a stamp collection (*Re Reynolds' Will Trusts, Dove v Reynolds*[1965] 3 All ER 686, [1966] 1 WLR 19), and a collection of clocks and watches (*Re Crispin's Will Trusts, Arkwright v Thurley*[1975] Ch 245 at 248, [1974] 3 All ER 772, CA) have been held to be personal chattels, but not a herd of cattle even where the herd was not run at a profit, for the herd was held to be the subject of a business (*Re Ogilby, Ogilby v Wentworth-Stanley*[1942] Ch 288, [1942] 1 All ER 524). Jewellery includes unmounted cut diamonds: *Re Whitby, Public Trustee v Whitby*[1944] Ch 210, [1944] 1 All ER 299, CA. In *Re Collins's Settlement Trusts, Donne v Hewetson* [1971] 1 All ER 283, [1971] 1 WLR 37 a collection of stamps and coins and a motor car were held to pass under a gift of personal effects.

11 The fixed net sum is of the amount provided by or under the Family Provision Act 1966 s 1: Administration of Estates Act 1925 s 46(1) (amended by the Family Provision Act 1966 s 1). The sum may be increased by order of the Lord Chancellor: see the Family Provision Act 1966 s 1(1), (3), (4). The sum has changed from time to time as follows: death on or after 1 January 1953: £20,000 (Intestates' Estates Act 1952 s 1); death on or after 1 January 1967: £30,000 (Family Provision Act 1966 s 1); death on or after 1 July 1972: £40,000 (Family Provision (Intestate Succession) Order 1972, SI 1972/916); death on or after 15 March 1977: £55,000 (Family Provision (Intestate Succession) Order 1977, SI 1977/415); death on or after 1 March 1981: £85,000 (Family Provision (Intestate Succession) Order 1981, SI 1981/255); death on or after 1 June 1987: £125,000 (Family Provision (Intestate Succession) Order 1987, SI 1987/799); death on or after 1 December 1993: £200,000 (Family Provision (Intestate Succession) Order 1993, SI 1993/2906). As to the fixed net sum where the deceased leaves issue see PARA 592 note 4 post.

12 By the Administration of Estates Act 1925 the sum is charged on the residuary estate of the intestate other than the personal chattels (see s 46(1)(i), Table para (3) (as substituted and amended)), but it amounts to an absolute gift, and in practice is always treated as such, and where the estate does not exceed the relevant sum after payment of testamentary expenses, debts and tax, the surviving spouse takes all.

13 See note 7 *supra*.

14 Administration of Estates Act 1925 s 46(4) (added by the Intestates' Estates Act 1952 s 1(4); and amended by the Family Provision Act 1966 s 1(2)(b), as regards deaths after 1 January 1967); Inheritance Tax Act 1984 s 273, Sch 6 para 1. This alters the law as laid down in *Re Saunders, Public Trustee v Saunders*[1929] 1 Ch 674 where the interest was held to be primarily payable out of capital.

15 Interest is payable at such rate as the Lord Chancellor may specify by order: see the Administration of Estates Act 1925 s 46(1)(i) (substituted by the Intestates' Estates Act 1952 s 1(2); and amended by the Administration of Justice Act 1977 s 28). The power to make orders under the Administration of Estates Act 1925 s 46(1) (as amended) is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and any such order may be varied or revoked by a subsequent order made under the power: s 46(1A) (added by the Administration of Justice Act 1977 s 28(1)). Since 1 October 1983 interest is payable at the rate of 6% per annum: Intestate Succession (Interest and Capitalisation) Order 1977, SI 1977/1491, art 2 (amended by SI 1983/1374).

16 Administration of Estates Act 1925 s 46(1)(i), Table para 3(a) (substituted by the Intestates' Estates Act 1952 s 1(2); and amended by the Family Provision Act 1966 s 1(2)(a)).

UPDATE

591 Surviving spouse's rights where there is no issue

TEXT AND NOTES--References to husband or wife are now to spouse or civil partner: Administration of Estates Act 1925 s 46 (amended by Civil Partnership Act 2004 Sch 4 para 7).

NOTE 11--Family Provision Act 1966 s 1(1) amended: Civil Partnership Act 2004 Sch 4 para 14. Death on or after 1 February 2009: £450,000 (Family Provision (Intestate Succession) Order 2009, SI 2009/135).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/592. Surviving spouse's rights where the deceased leaves issue.

592. Surviving spouse's rights where the deceased leaves issue.

If the intestate leaves issue¹, the surviving spouse, if surviving the intestate by the period of 28 days beginning with the day on which the intestate died², takes the personal chattels³, a fixed net sum⁴ absolutely⁵, free of inheritance tax and costs, and with interest primarily payable out of income⁶ at 6 per cent per annum⁷ until paid or appropriated, and a life interest in half the remainder⁸. If the trusts in favour of the intestate's issue fail because no child or other issue attains an absolutely vested interest, the residuary estate devolves as if the intestate had died without leaving issue⁹.

1 For the meaning of 'intestate' see PARA 555 note 1 *ante*. As to the meaning of 'issue' see PARA 588 *ante*. This applies whether or not the intestate also leaves a parent, a brother or sister of the whole blood or issue of a brother or sister of the whole blood: see the Administration of Estates Act 1925 s 46(1)(i), Table para (2) (as substituted and amended: see note 8 *infra*).

2 Administration of Estates Act 1925 s 46(2A) (added with effect from 1 January 1996 by the Law Reform (Succession) Act 1995 s 1(1), (3)): see PARA 591 note 2 ante.

3 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

4 The fixed net sum is of the amount provided by or under the Family Provision Act 1966 s 1: Administration of Estates Act 1925 s 46(1) (amended by the Family Provision Act 1966 s 1). The sum may be increased by order of the Lord Chancellor: see the Family Provision Act 1966 s 1(1), (3), (4). The sum has changed from time to time as follows: death on or after 1 January 1953: £5,000 (Intestates' Estates Act 1952 s 1); death on or after 1 January 1967: £8,750 (Family Provision Act 1966 s 1); death on or after 1 July 1972: £15,000 (Family Provision (Intestate Succession) Order 1972, SI 1972/916); death on or after 15 March 1977: £25,000 (Family Provision (Intestate Succession) Order 1977, SI 1977/415); death on or after 1 March 1981: £40,000 (Family Provision (Intestate Succession) Order 1981, SI 1981/255); death on or after 1 June 1987: £75,000 (Family Provision (Intestate Succession) Order 1987, SI 1987/799); death on or after 1 December 1993: £125,000 (Family Provision (Intestate Succession) Order 1993, SI 1993/2906). As to the fixed net sum where the deceased leaves no issue see PARA 591 note 11 ante.

5 See PARA 591 note 12 ante.

6 See PARA 591 note 14 ante.

7 See PARA 591 note 15 ante.

8 Administration of Estates Act 1925 s 46(1)(i), Table para (2) (substituted by the Intestates' Estates Act 1952 s 1(2); and amended by the Family Provision Act 1966 s 1(2)(a)); Inheritance Tax Act 1984 s 273, Sch 6 para 1.

9 See the Administration of Estates Act 1925 s 47(2). See also PARA 608 post.

UPDATE

592 Surviving spouse's rights where the deceased leaves issue

NOTE 4--Family Provision Act 1966 s 1(1) amended: Civil Partnership Act 2004 Sch 4 para 14. Death on or after 1 February 2009: £250,000 (Family Provision (Intestate Succession) Order 2009, SI 2009/135).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/593. Right to require appropriation of matrimonial home.

593. Right to require appropriation of matrimonial home.

Where the residuary estate of the intestate¹ comprises an interest² in a dwelling house³ in which the surviving spouse⁴ was resident⁵ at the time of the intestate's death, the surviving spouse may (except if he or she is sole personal representative) by written notice⁶ within 12 months of the date of the first general⁷ grant of representation⁸ require the personal representative to appropriate⁹ the intestate's interest¹⁰ in the dwelling house in or towards satisfaction of any absolute interest¹¹ of the surviving spouse in the intestate's real or personal estate¹². The appropriation is made at the value of the house at the time of appropriation and not as at the date of death¹³.

1 For the meaning of 'intestate' see PARA 555 note 1 ante; definition applied by the Intestates' Estates Act 1952 s 6(1).

2 The intestate's interest in the dwelling house must not, if the right is to be exercised, have been a tenancy which would determine or could by notice given after the date of death be determined within two years of that date (ibid s 5, Sch 2 para 1(2)). This condition does not apply (no matter when the death occurred) if: (1) the surviving spouse would in consequence of such an appropriation become entitled under the Leasehold Reform Act 1967 to acquire the freehold or an extended leasehold either immediately on the appropriation or before the tenancy determines (s 7(8)(a), (9)); or (2) the intestate had given notice under that Act and the benefit of the notice is appropriated with the tenancy (s 7(8)(b), (9)).

3 Where part of a building was, at the date of the death of the intestate, occupied as a separate dwelling, that dwelling is treated as a dwelling house: Intestates' Estates Act 1952 Sch 2 para 1(5). Except where the context otherwise requires, references to a dwelling house include references to any garden or portion of ground attached to and usually occupied with, or otherwise required for the amenity or convenience of, the dwelling house: Sch 2 para 7(1).

4 As to special provisions where the surviving spouse is a minor or of unsound mind see ibid Sch 2 para 6. The right to acquire the matrimonial home is not exercisable after the death of the surviving spouse: Sch 2 para 3(1)(b).

5 'Was resident' must mean 'had his home', that is, it is not necessary that the surviving spouse should be physically present there at the moment of the intestate's death.

6 Intestates' Estates Act 1952 Sch 2 para 3(1)(c). The notice is revocable only with the consent of the personal representative: s 3(2).

7 See the Intestates' Estates Act 1952 Sch 2 para 3(3), applying the Administration of Estates Act 1925 s 47A(9) (as added): see PARA 598 note 3 post.

8 Intestates' Estates Act 1952 Sch 2 para 3(1)(a). The court may extend this period: see Sch 2 para 3(3), applying the Administration of Estates Act 1925 s 47A(5) proviso (as added): see PARA 598 note 4 post.

9 The appropriation is made under the Administration of Estates Act 1925 s 41 (as amended) (see PARAS 573-574 ante), and may be made in part consideration of a money payment: Intestates' Estates Act 1952 Sch 2 paras 1(1), 5(2). Such an assent is not normally liable to ad valorem stamp duty, since the surviving spouse can insist on the appropriation and there is no contractual element in the transaction: see 18 Conveyancer and Property Lawyer 1; and cf paras 571, 582 ante.

Where the surviving spouse is one of two or more personal representatives, the rule that a trustee may not be a purchaser of trust property does not prevent the surviving spouse from purchasing out of the estate an interest in a dwelling house in which he or she was resident at the time of the intestate's death: Intestates' Estates Act 1952 Sch 2 para 5(1). Where (1) the dwelling-house forms part of a building and an interest in the whole of the building is comprised in the residuary estate; (2) the dwelling-house is held with agricultural land and an interest in the agricultural land is comprised in the residuary estate; (3) the whole or part of the dwelling-house was at the time of the intestate's death used as a hotel or lodging house; or (4) a part of the dwelling-house was at the time of the intestate's death used for purposes other than domestic purposes, the right conferred by Sch 2 para 1 is not exercisable unless the court, on being satisfied that the exercise of that right is not likely to diminish the value of assets in the residuary estate (other than the said interest in the dwelling-house) or make them more difficult to dispose of, so orders: Sch 2 para 2. See also PARA 594 post.

10 See note 2 supra.

11 The reference to an absolute interest in the real and personal estate of the intestate includes a reference to the capital value of a life interest which the surviving spouse has elected to have redeemed: Intestates' Estates Act 1952 Sch 2 para 1(4). See also PARA 597 post.

12 Ibid Sch 2 para 1(1). Nothing in the Administration of Estates Act 1925 s 41(5) (see PARA 573 ante) prevents the personal representative from giving effect to this right: Intestates' Estates Act 1952 Sch 2 para 1(3). The surviving spouse may require the personal representative to have the interest in the dwelling house valued in accordance with the Administration of Estates Act 1925 s 41 (as amended) (see PARA 573 ante), and to inform him or her of the result of the valuation before he or she decides whether to exercise the right: Intestates' Estates Act 1952 Sch 2 para 3(2). Where the surviving spouse's absolute interest in the estate is less than the value of the house, the surviving spouse is nevertheless entitled to pay the difference and require the house to be appropriated: *Re Phelps, Wells v Phelps* [1980] Ch 275, [1979] 3 All ER 373, CA.

13 *Robinson v Collins* [1975] 1 All ER 321, sub nom *Re Collins, Robinson v Collins* [1975] 1 WLR 309. See also PARA 577 ante.

UPDATE

593 Right to require appropriation of matrimonial [or civil partnership] home

TEXT AND NOTES--Intestates' Estates Act 1952 s 5, Sch 2 amended: Civil Partnership Act 2004 Sch 4 para 13; Mental Capacity Act 2005 Sch 6 para 8.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/594. Restriction on sale of matrimonial home.

594. Restriction on sale of matrimonial home.

During the 12 months within which the written notice must be served¹ the personal representative may only sell or otherwise dispose of the dwelling house² with the written consent of the surviving spouse, or in the course of administration owing to want of other assets, or by the authority of the court to which he can apply at any time to have the matter determined³. These provisions⁴ do not confer any right on the surviving spouse as against a purchaser from the personal representative⁵.

The right of the widow of a tenant of a house subject to the rent restriction legislation to remain in occupation⁶ and the right of a deserted wife to remain in occupation of the matrimonial home⁷ are considered elsewhere in this work.

1 Ie under the Intestates' Estates Act 1952 s 5, Sch 2 para 3: see PARA 593 ante. Where the court under Sch 2 para 3(3) (see PARA 593 note 8 ante) extends the said period of 12 months, the court may direct that Sch 2 para 4 is to apply in relation to the extended period as it applied in relation to the original period of 12 months: Sch 2 para 4(3).

2 For the meaning of 'dwelling house' see PARA 593 note 3 ante.

3 Intestates' Estates Act 1952 Sch 2 para 4(1), (2). The personal representatives as well as the surviving spouse may apply to the court in the circumstances in which a court order is necessary (see PARA 593 note 9 ante), and if the court is satisfied that the exercise of the surviving spouse's right to acquire the matrimonial home is likely to diminish the value of the residuary estate (other than the interest in the dwelling house in question) or make it more difficult to dispose of, the court may authorise the personal representative to dispose of that interest within the period of 12 months: see Sch 2 paras 2, 4(2). Schedule 2 para 4 does not apply where the surviving spouse is the sole personal representative or one of two or more personal representatives: Sch 2 para 4(4).

4 Ie *ibid* Sch 2 para 4: see Sch 2 para 4(5).

5 Ibid Sch 2 para 4(5).

6 See the Rent Act 1977 s 2, Sch 1 para 2 (as amended); and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 843 et seq.

7 See eg *Westminster Bank Ltd v Lee* [1956] Ch 7, [1955] 2 All ER 883; and the Family Law Act 1996 Pt IV (ss 30-63) (as amended).

UPDATE

594 Restriction on sale of matrimonial [or civil partnership] home

TEXT AND NOTES 1-5--Intestates' Estates Act 1952 s 5, Sch 2 amended: Civil Partnership Act 2004 Sch 4 para 13.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/595. Death of judicially separated spouse.

595. Death of judicially separated spouse.

If, on the death of one of the parties to a marriage, a decree of judicial separation is in force, the property of the deceased spouse passes on intestacy as if the other party to the marriage had then been dead¹. An order that one party to a marriage be no longer bound to cohabit² does not for this purpose have effect as a decree of judicial separation³. This, however, is only the position where the death occurred on or after 1 August 1970⁴. Before that date, and now in the case of intestate distribution by reference to a death before 1 August 1970⁵, only property of a wife acquired since the date of decree passes on intestacy in this manner⁶. On the other hand, a wife who had been judicially separated from her husband was entitled on his death intestate to her interests in his property under the ordinary rules⁷.

A covenant by a wife in a separation deed that she would accept an annuity in lieu of her rights at common law or by custom in her husband's estate on his death did not necessarily bar her claim to her interest on an intestacy⁸.

1 See the Matrimonial Causes Act 1973 s 18(2); and PARA 162 ante.

2 Ie under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 s 2(1)(a) (repealed): see the Matrimonial Causes Act 1973 s 18(3).

3 Ibid s 18(3).

4 Ibid Sch 1 para 13.

5 See ibid Sch 1 para 13, saving the application of the Matrimonial Causes Act 1965 s 20(3) (otherwise repealed), in relation to the death of a wife intestate before 1 August 1970.

6 Ibid s 20(3) (repealed); Matrimonial Proceedings and Property Act 1970 s 40(3) (repealed). Such property includes future interests to which she was entitled at the date of the decree of judicial separation: see the Matrimonial Causes Act 1965 s 20(3) (repealed). As to the grant in such a case see PARA 162 ante.

7 See *Rolfe v Perry* (1863) 1 New Rep 428, where a woman who had been divorced a mensa et thoro from her husband who died intestate was held entitled to share in his estate. Any ground on which a decree of divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act 1857 ceased to be a ground on which a petition for judicial separation might be presented, as from 1 January 1971: see the Divorce Reform Act 1969 ss 8(1), 11(1) (repealed); cf *Re Ihler* (1873) LR 3 P & D 50.

8 *Slatter v Slatter* (1834) 1 Y & C Ex 28. This case may also be explained on the ground that an annuity is not a satisfaction of the wife's rights on an intestacy (cf *Couch v Stratton* (1799) 4 Ves 391; *Salisbury v Salisbury* (1848) 6 Hare 526), and it does not necessarily follow that the rights under an intestacy cannot in such a deed be barred by apt words. See also PARA 602 post; and EQUITY vol 16(2) (Reissue) PARA 756.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/596. Divorce.

596. Divorce.

Where a marriage is null or has been annulled or dissolved by a decree absolute of divorce, on the death intestate of one party to the marriage the other is not a surviving husband or wife and therefore takes no interest in the estate¹.

¹ Cf *Re Morrieson, Hitchins v Morrieson* (1888) 40 ChD 30; *Bosworthwick v Clegg* (1929) 45 TLR 438; *Re Williams' Settlement, Greenwell v Humphries* [1929] 2 Ch 361, CA; *Re Slaughter, Trustees Corp'n Ltd v Slaughter* [1945] Ch 355, [1945] 2 All ER 214; *Re Allan, Allan v Midland Bank Executor and Trustee Co Ltd* [1954] Ch 295, [1954] 1 All ER 646, CA (decisions as to the meaning of 'husband' and 'wife' in wills and settlements). See also *Re Seaford, Seaford v Seifort* [1967] P 325, [1967] 2 All ER 458 (filing of application for decree absolute on same day as death of intestate; marriage had ceased to exist). See also POWERS vol 36(2) (Reissue) PARA 387; WILLS vol 50 (2005 Reissue) PARAS 468-469. It seems clear that these decisions must govern the construction of the words of the Administration of Estates Act 1925 s 46(1)(i) (substituted by the Intestates' Estates Act 1952 s 1(1)(2); and amended by the Family Provision Act 1966 s 1; and by the Statute Law (Repeals) Act 1981). As to recognition of foreign divorces in non-contentious probate proceedings see PARA 163 ante.

UPDATE

596 Divorce

NOTE 1--*Seaford*, cited, reversed: [1968] 1 All ER 482 (since husband died before notice of application lodged, the divorce suit was destroyed and the wife remained married to the husband at his death).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/597. Surviving spouse's right to redeem statutory life interest.

597. Surviving spouse's right to redeem statutory life interest.

The life interest of a surviving spouse¹ in part of the residuary estate², while it is in possession³, must, if the surviving spouse so elects, be purchased or redeemed by the personal representative⁴ by paying its capital value⁵ to the tenant for life or the persons deriving title under the tenant for life⁶, and the costs of the transaction and the residuary estate may then be dealt with and distributed free from the life interest⁷.

¹ I.e., where the intestate dies on or after 1 January 1996, a spouse who survives the intestate by the period of 28 days beginning with the date on which the intestate dies: see PARA 591 ante.

² See PARA 592 ante.

³ See PARA 598 post. The life interest vests immediately on the intestate's death: *Cooper v Cooper* (1874) LR 7 HL 53.

⁴ For the meaning of 'personal representative' see PARA 4 ante. Where there is a life interest, administration can be granted only to two or more persons, except where the grant is to a trust corporation (see the Supreme Court Act 1981 s 114(2); and PARA 167 ante); but 'personal representative' is in general used in the singular in the Administration of Estates Act 1925 s 47A (as added and amended), and a sole surviving administrator, as well as a sole executor, can therefore act for this purpose subject to the special provision set out in PARA 598 text to notes 7-8 post.

⁵ As to the calculation of capital value see PARA 600 post.

6 Since the life interest is to be redeemed while in possession, these persons can only be assignees or chargees.

7 Administration of Estates Act 1925 s 47A(1) (added by the Intestates' Estates Act 1952 s 2). This power to redeem is given for the purpose of facilitating the distribution of the estate. It would seem that the whole costs of the transaction are thrown upon the residuary estate.

UPDATE

597 Surviving spouse's right to redeem statutory life interest

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTE 7--Administration of Estates Act 1925 s 47A(1) amended: Civil Partnership Act 2004 Sch 4 para 9.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/598. Conditions for election to redeem.

598. Conditions for election to redeem.

An election to redeem a life interest is only exercisable if at the time of the election the whole of the part of the residuary estate concerned consists of property in possession¹. A life interest in property partly in possession and partly not is treated as consisting of two separate life interests in those respective parts of the property². An election must be exercised within 12 months from the date on which a general grant³ of representation is first taken out unless the court extends this period⁴. The election, which is irrevocable except with the consent of the personal representative and can be effectively made by a tenant for life who is a minor⁵, must be notified in writing to the personal representative⁶, except where the tenant for life is the sole personal representative⁷, when written notice must be given to the senior registrar⁸.

1 Administration of Estates Act 1925 s 47A(3) (s 47A added by the Intestates' Estates Act 1952 s 2). Where a will of a person who dies partially intestate (see PARAS 585 ante, 615 et seq post) creates a life interest in property in possession and the remaining interest in that property forms part of the residuary estate, that remaining interest is, until the life interest determines, property not in possession and the surviving spouse's interest in it is, therefore, not redeemable: see the Administration of Estates Act 1925 s 49(4) (added by the Intestates' Estates Act 1952 ss 3(3), 4). For the meaning of 'will' see PARA 3 note 1 ante; for the meaning of 'intestate' see PARA 555 note 1 ante; and for the meaning of 'property' see PARA 4 note 4 ante.

2 Administration of Estates Act 1925 s 47A(3) (as added: see note 1 supra).

3 See *ibid* s 47A(9) (as added: see note 1 supra). In considering for this purpose when representation was first taken out, a grant limited to settled land or to trust property must be left out of account and a grant limited to real estate or to personal estate must also be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time: s 47A(9) (as so added). For the meaning of 'settled land' see PARA 229 note 2 ante; and for the meaning of 'real estate' see PARA 3 note 1 ante.

4 *Ibid* s 47A(5) (as added: see note 1 supra). The court may extend the period if it is satisfied by the surviving spouse that the limitation to 12 months would operate unfairly in consequence of: (1) the representation first taken out being probate of a will subsequently revoked on the ground that the will was invalid; (2) a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out; or (3) some other circumstances affecting the administration or distribution of the estate: s 47A(5) proviso (as so added). For the meaning of 'court' see PARA 375 note 2 ante.

5 Ibid s 47A(8) (as added: see note 1 supra). An election by a tenant for life who is a minor is as valid and binding as it would be if the tenant for life were of age, but the personal representative must, instead of paying the capital value of the life interest to the tenant for life, deal with it in the same manner as with any other part of the residuary estate to which he is entitled absolutely: s 47A(8) (as so added). For the meaning of 'tenant for life' see PARA 236 note 5 ante. For the meaning of 'personal representative' see PARA 4 ante.

6 Ibid s 47A(6) (as added: see note 1 supra).

7 Where there are two or more personal representatives of whom one is the tenant for life, the written notice must be given to all of them except the tenant for life: ibid s 47A(6) (as added: see note 1 supra).

8 Ibid s 47A(7) (as added (see note 1 supra); and amended by the Administration of Justice Act 1970 s 1(6), Sch 2 para 4; and by the Supreme Court Act 1981 s 152(1), Sch 5). Where the tenant for life is the sole personal representative an election is not effective unless written notice is given to the Senior Registrar of the Family Division of the High Court within the period within which it must be made; and provision may be made by probate rules for keeping a record of such notices and making that record available to the public: Administration of Estates Act 1925 s 47A(7) (as so added and amended). 'Probate rules' means rules of court made under the Supreme Court Act 1981 s 127 (see PARA 81 ante); Administration of Estates Act 1925 s 47A(7) (as so added).

Where a surviving spouse who is the sole or sole surviving personal representative of the deceased is entitled to a life interest in part of the residuary estate and elects to have the life interest redeemed, he may give written notice of the election to the senior district judge by filing a notice in Form 6 in the Principal Registry or in the district probate registry from which the grant issued: Non-Contentious Probate Rules 1987, SI 1987/2024, r 56(1), Sch 1 Form 6 (both amended by SI 1991/1876). Where the grant issued from a district probate registry, the notice must be filed in duplicate: Non-Contentious Probate Rules 1987, SI 1987/2024, r 56(2). A notice filed under this provision must be noted on the grant and the record and must be open to inspection: r 56(3). For the meaning of 'senior district judge' see PARA 87 note 2 ante.

UPDATE

598 Conditions for election to redeem

NOTE 4--Administration of Estates Act 1925 s 47A(5) proviso amended: Civil Partnership Act 2004 Sch 4 para 9.

NOTE 8--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

SI 1987/2024 r 56, Sch 1 Form 6 further amended: SI 2005/2114.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/599. Raising the sum.

599. Raising the sum.

The capital sum (including the costs) required for the purchase or redemption of the life interest of a surviving spouse of an intestate¹ may be raised by charging the residuary estate or any part of it (other than the personal chattels²), so far as the sum has not been satisfied by the application of any part of the residuary estate³. The fixed net sum⁴ or any part of it may be similarly raised or satisfied by appropriation⁵.

1 For the meaning of 'intestate' see PARA 555 note 1 ante.

2 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

3 Administration of Estates Act 1925 s 48(2)(b).

4 As to the fixed net sum see PARAS 591 note 11, 592 note 4 ante.

5 Administration of Estates Act 1925 s 48(2)(a) (amended by the Intestates' Estates Act 1952 ss 1(3)(d), 4 (and set out in amended form in Sch 1); and by the Family Provision Act 1966 s 1(2)(b)). As to the personal representative's power of appropriation see PARA 573 ante. The costs of raising the fixed net sum are similarly thrown on the residuary estate: Administration of Estates Act 1925 s 48(2).

UPDATE

599 Raising the sum

TEXT AND NOTES--Administration of Estates Act 1925 s 48(2) further amended: Civil Partnership Act 2004 Sch 4 para 10.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(i) Right of Surviving Spouse/600. Valuation of life interest.

600. Valuation of life interest.

Where the surviving spouse of an intestate exercises the right to redeem the life interest in his residuary estate¹, the capital value of the interest is reckoned in such manner as the Lord Chancellor may by order direct². There must be ascertained by reference to the index compiled by the Financial Times, the Institute of Actuaries and the Faculty of Actuaries the average gross redemption yield on medium coupon 15-year Government Stocks at the date on which the election was exercised or, if the index was not compiled on that date, by reference to the index on the last date before that date on which it was compiled³. There should then be selected the column in the relevant actuarial table⁴ which corresponds with the average gross redemption so ascertained and the appropriate multiplier identified by taking the figure appearing in that column opposite the age which the surviving spouse had attained at the date on which the election was exercised⁵. Finally, the capital value of the life interest is calculated by taking the product of the value of the part of the residuary estate (whether or not yielding income) in respect of which the election has been exercised and the multiplier so identified⁶.

1 *Ie* under the Administration of Estates Act 1925 s 47A(1) (as added): see PARA 597 ante.

2 *Ibid* s 47A(3A) (s 47(3A), (3B) added by the Administration of Justice Act 1977 s 28(3)). The power to make such orders is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and any such order may be varied or revoked by a subsequent order made under the power: Administration of Estates Act 1925 s 47A(3B) (as so added). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477. Where an election is exercised in accordance with s 47A(6), (7) (as added and amended) (see PARA 598 ante) the capital value of the life interest of the surviving spouse must be reckoned in accordance with the Intestate Succession (Interest and Capitalisation) Order 1977, SI 1977/1491, art 3(2), (3): art 3(1). This order applies where the right to redeem is exercised on or after 15 September 1977 (see arts 1, 3(1)) and replaces the rules contained in the Administration of Estates Act 1925 s 47A(2), (4) (repealed with effect from the same date by the Administration of Justice Act 1977 s 32, Sch 5 Pt VI). As to the rules which applied to elections made before 15 September 1977 see the Administration of Estates Act 1925 s 47A(2), (4) (added by the Intestates' Estates Act 1952 s 2).

3 Intestate Succession (Interest and Capitalisation) Order 1977, SI 1977/1491, art 3(2).

4 For the actuarial tables see *ibid* art 3(3), Schedule. There are separate tables for men and women to allow for the different life expectancies between them.

5 Ibid art 3(2), (3).

6 Ibid art 3(3).

UPDATE

600 Valuation of life interest

NOTES--SI 1977/1491 amended: SI 2005/2114, SI 2008/3162.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTTESTATE AFTER 1952/(i) Right of Surviving Spouse/601. Surviving spouse's right to income.

601. Surviving spouse's right to income.

The income¹ of so much of the real and personal estate of the deceased as may not be disposed of by his will², if any, or may not be required for administration purposes³, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman, that is, the surviving spouse and issue⁴.

1 The income includes net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income: Administration of Estates Act 1925 s 33(5). For the meaning of 'real estate' see PARA 3 note 1 ante.

2 For the meaning of 'will' see PARA 3 note 1 ante.

3 See PARAS 555-556 ante.

4 Administration of Estates Act 1925 s 33(5). This will, it seems, exclude the rule in *Howe v Earl of Dartmouth* (see *Re Sullivan, Dunkley v Sullivan* [1930] 1 Ch 84; and PARAS 540-545 ante), so that half the entire income is payable to the surviving spouse; but see *Re Fisher, Harris v Fisher* [1943] Ch 377, [1943] 2 All ER 615 (rule in *Re Earl of Chesterfield's Trusts*, excluded as to reversionary interests by the Administration of Estates Act 1925 s 33(1) (as originally enacted), but not excluded as to other property not producing income unless the property has been retained by a proper exercise of the discretion to postpone sale). The amendment to the Administration of Estates Act 1925 s 33(1) made by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 5 (see PARA 555 ante) by which with effect from 1 January 1997 a power of sale was substituted for the former trust for sale of an intestate's estate, may further reduce the chances of the rule in *Howe v Earl of Dartmouth* applying: see PARA 542 ante.

The reference to apportionment seems to import the rule in *Allhusen v Whittell* as to administration expenses and debts being payable partly out of capital and partly out of income for the first year after the intestate's death: see *Re Wills, Wills v Hamilton* [1915] 1 Ch 769; *Re Ullswater, Barclays Bank Ltd v Lowther* [1952] Ch 105, [1951] 2 All ER 989. As to these rules and their application in detail see PARA 536 et seq ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTTESTATE AFTER 1952/(i) Right of Surviving Spouse/602. Barring a widow's claim to benefit.

602. Barring a widow's claim to benefit.

A widow's claim to benefit in her husband's estate on his intestacy may be barred wholly or partially by the terms of a covenant or settlement if provision is made by it for the wife upon the husband's death¹ or by the terms of his will where he has died partially intestate.

If a man by his will gives property to his wife and declares that it is to be taken in satisfaction of her rights under his intestacy, and dies partially intestate, her rights in respect of the property as to which he has died intestate are determined by considering whether the intestacy appears to have been accidental or intentional. If the husband has on the face of his will disposed of all his property, but in the events which have happened part of it does not pass by his will, it is considered that he did not intend his wife to be in any worse position than his next of kin, and she takes her share of the property which is undisposed of². Where, however, the intestacy is apparent on the face of the will, it is considered that he deliberately left the property to pass to his statutory next of kin in reliance on the exclusion of his wife by the declaration contained in his will, and she is therefore barred of her share under the intestacy³.

Where the parties are judicially separated and one of them dies intestate, the surviving spouse is now treated for the purposes of the intestacy rules as being then dead and therefore does not take under the intestacy rules⁴. Under the former law a separation deed in ordinary form did not normally affect the right of a surviving spouse on intestacy⁵.

1 See EQUITY vol 16(2) (Reissue) PARA 756. The widow's claim is not barred where the provision has been made to take effect before the husband's death: *Lang v Lang* (1837) 8 Sim 451. It seems that the widow would be entitled by disclaiming the provision made by covenant or settlement to claim her full rights under the intestacy and if these do not make reasonable provision she is now entitled to claim further provision under the Inheritance (Provision for Family and Dependents) Act 1975: see PARA 665 et seq post.

2 *Pickering v Lord Stamford* (1797) 3 Ves 332 (on appeal 3 Ves 492); *Garthshore v Chalie* (1804) 10 Ves 1.

3 *Lett v Randall* (1855) 3 Sm & G 83 at 87-90.

4 See the Matrimonial Causes Act 1973 s 18(2) (see PARAS 162, 595 ante) replacing the corresponding provisions of the Matrimonial Proceedings and Property Act 1970 in relation to deaths on or after 1 August 1970.

5 The surviving spouse's right could be barred by the use of apt words: see *Wilcocks v Wilcocks* (1706) 2 Vern 558; *Blandy v Widmore* (1715) 2 Vern 709; *Garthshore v Chalie* (1804) 10 Ves 1. See also PARA 595 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(ii) Rights of Issue under the Statutory Trusts/603. Issue.

(ii) Rights of Issue under the Statutory Trusts

603. Issue.

Where the intestate¹ does not leave a surviving spouse or, in the case of an intestate dying on or after 1 January 1996, the intestate's spouse survives but dies before the end of the period of 28 days beginning with the day on which the intestate died², the issue³ of an intestate take the whole of his residuary estate upon the statutory trusts⁴. Where there is a surviving spouse, the issue take upon the statutory trusts subject to his or her interests; accordingly, they take immediately one-half of the residuary estate less the personal chattels⁵, and the fixed net sum⁶, and take the other half upon the death of the surviving spouse⁷.

1 For the meaning of 'intestate' see PARA 555 note 1 ante.

2 Administration of Estates Act 1925 s 46(2A) (added by the Law Reform (Succession) Act 1995 s 1(1), (3)).

3 As to the meaning of 'issue' see PARA 588 ante.

4 Administration of Estates Act 1925 s 46(1)(ii). As to the statutory trusts see PARA 604 post. They are very conveniently stated thus: (1) all members of a class take equally; (2) shares of members under 18 are contingent on the attaining of that age or marrying under that age; (3) the share of any member who predeceases the testator is taken by his children or remoter issue equally among them per stirpes, but contingently upon attaining 18 or marrying under that age: see PARA 604 post.

5 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

6 As to the fixed net sum see PARA 592 note 4 ante.

7 Administration of Estates Act 1925 s 46(1)(i), Table para (2) (substituted by the Intestates' Estates Act 1952 s 1(2); and amended by the Family Provision Act 1966 s 1(2)(a)).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(ii) Rights of Issue under the Statutory Trusts/604. The statutory trusts.

604. The statutory trusts.

Where any part of the residuary estate of an intestate¹ is directed to be held on the statutory trusts for the issue of the intestate it is held in trust, in equal shares if more than one, for all or any of the children or child of the intestate, living at his death, who attain the age of 18 or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of 18 or marry under that age of any child of the intestate who predeceases the intestate², such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking³. A posthumous child or issue can take under these provisions⁴.

1 For the meaning of 'intestate' see PARA 555 note 1 ante.

2 For the analogous provision by which a lapse is prevented in will cases see the Wills Act 1837 s 33 (as substituted); and WILLS vol 50 (2005 Reissue) PARAS 466-467.

3 Administration of Estates Act 1925 s 47(1)(i) (amended by the Family Law Reform Act 1969 s 3(2)). The issue of the intestate's issue therefore take per stirpes, ie by their stocks, and so if the intestate has two children, A and B, and B predeceases him leaving two surviving children, C and D, A will take half and C and D a quarter each.

4 References to a child or issue living at the death of any person include a child or issue en ventre sa mere at the death: Administration of Estates Act 1925 s 55(2). See also *Wallis v Hodson* (1740) 2 Atk 114.

UPDATE

604 The statutory trusts

TEXT AND NOTE 3--Administration of Estates Act 1925 s 47(1)(i) further amended: Civil Partnership Act 2004 Sch 4 para 8.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(ii) Rights of Issue under the Statutory Trusts/605. Advancements.

605. Advancements.

The statutory power of advancement¹ and the statutory provisions for maintenance and accumulation of surplus income² apply to the shares of infant beneficiaries³.

Where, in the case of an intestate dying before 1996⁴, any part of the residuary estate held on the statutory trusts for issue⁵ was divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate⁶ had been paid to the child by the intestate⁷ or settled by the intestate for the benefit of the child (including any life or less interest and including property covenanted to be paid or settled) had, subject to any contrary intention expressed or appearing from the circumstances of the case, to be taken as being so paid or settled in or towards satisfaction of the share of the child or the share which the child would have taken if living at the death of the intestate and had to be brought into account at a valuation (the value to be reckoned as at the death of the intestate) in accordance with the requirements of the personal representatives⁸. Advances by the personal representatives under the statutory power might also have to be brought into hotchpot⁹. These provisions are abolished in relation to deaths on or after 1 January 1996¹⁰.

¹ See the Trustee Act 1925 s 32 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 76 et seq.

² See *ibid* s 31 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 63 et seq.

³ Administration of Estates Act 1925 s 47(1)(ii). When an infant marries such infant is entitled to give valid receipts for the income of the infant's share or interest: s 47(1)(ii).

⁴ The hotchpot provisions contained in *ibid* s 47(1)(iii) were repealed with effect from 1 January 1996 by the Law Reform (Succession) Act 1995 ss 1(2)(a), (3), 5, Schedule.

⁵ The hotchpot provisions (see note 4 *supra*) were confined to the issue of the intestate: see the Administration of Estates Act 1925 s 49(1)(a) (repealed with effect from 1 January 1996 by the Law Reform (Succession) Act 1995 s 1(2)(b), 5, Schedule).

⁶ These words confined the rule to settlements made either by way of advancement or on the marriage of the child concerned, so that benefits under other settlements did not have to be brought into account: *Re Hayward, Kerrod v Hayward* [1957] Ch 528, [1957] 2 All ER 474, CA.

⁷ An advance by trustees in pursuance of an appointment made by the intestate in exercise of a power was not an advance within the meaning of the Administration of Estates Act 1925 s 47(1)(iii) (repealed: see note 4 *supra*): *Re Reeve, Reeve v Reeve* [1935] Ch 110.

⁸ Administration of Estates Act 1925 s 47(1)(iii) (repealed: see note 4 *supra*). Cf valuation for hotchpot where a testator has directed in his will that advances in his lifetime are to be brought into account: see PARA 535 ante; and WILLS vol 50 (2005 Reissue) PARA 688 et seq. See also, in relation to partial intestacies *Re Grover's Will Trust, National Provincial Bank Ltd v Clarke* [1971] Ch 168 at 179, [1970] 1 All ER 1185 at 1190 per Pennycuik J; and PARA 616 note 10 post.

⁹ See the Trustee Act 1925 s 32(1) proviso (b); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 77. As to valuation for the purposes of hotchpot in cases of testacy, cf para 535 ante; and WILLS vol 50 (2005 Reissue) PARA 689; and in relation to partial intestacies see note 8 *supra*.

¹⁰ See notes 4-5 *supra*.

UPDATE

605 Advancements

TEXT AND NOTE 3--Administration of Estates Act 1925 s 47(1)(ii) amended: Civil Partnership Act 2004 Sch 4 para 8.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(ii) Rights of Issue under the Statutory Trusts/606. What payments constituted advancements.

606. What payments constituted advancements.

In the case of an intestate dying before 1996¹ it may still be necessary to determine what payments were made by way of advancement. For the purpose of determining whether a payment is made by way of advancement a distinction is drawn between sums given as casual payments or to relieve a child from temporary difficulties, and sums given to start a child in life or make a provision for him. The latter only are deemed advances by way of portion, but if the gift made by the intestate was of a large amount there is a *prima facie* presumption that it was given by way of portion². No general rule can be laid down as to what is and what is not to be considered a portion, for the time and manner of the gift have in every case to be considered³, as must any intention expressed or appearing from the circumstances of the case⁴. Payments for education or maintenance⁵, or apprenticeship⁶, or gifts of jewellery or clothing⁷, or small allowances⁸, are not advances. The payment which is made as a provision for a child is nonetheless a portion because it will not necessarily be permanent, or because it is not paid directly or entirely to him; accordingly, where a father makes a provision for a son on his marriage, or a daughter's portion is paid to her husband who covenants to lay it out in land to be settled, these are advances, and the whole sum paid, not merely the value of the child's life interest, is to be brought into account⁹.

¹ The hotchpot provisions contained in the Administration of Estates Act 1925 ss 47(1)(iii), 49(1)(a) were repealed in relation to deaths on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 1(2)(a), (b), (3), 5, Schedule.

² *Re Scott, Langton v Scott* [1903] 1 Ch 1, CA, where *Taylor v Taylor* (1875) LR 20 Eq 155 was followed in preference to *Boyd v Boyd* (1867) LR 4 Eq 305 and *Re Blockley, Blockley v Blockley* (1885) 29 ChD 250. Cf *Watson v Watson* (1864) 33 Beav 574. See also WILLS vol 50 (2005 Reissue) PARA 688 et seq.

³ *Re Scott, Langton v Scott* [1903] 1 Ch 1, CA; *Re Hayward, Kerrod v Hayward* [1957] Ch 528, [1957] 2 All ER 474, CA (nominations of £507 National Savings Certificates held not to be advancements in relation to an estate of £1,780).

⁴ See PARA 605 text to note 8 ante.

⁵ *Pusey v Desbouvrie* (1734) 3 P Wms 315 at 317 note (o); *Re Cameron* [1999] Ch 386, [1999] 2 All ER 924.

⁶ *Hender v Rose* (1718) 2 Eq Cas Abr 265.

⁷ *Elliot v Collier* (1747) 3 Atk 526 at 528.

⁸ *Hatfield v Minet* (1878) 8 ChD 136 at 144, CA, per James LJ, where the payments of an annuity to a child under a deed of covenant during the father's life were not ordered to be brought into hotchpot, but the value of the annuity at the death was treated as an advancement.

⁹ *Weyland v Weyland* (1742) 2 Atk 632; *Lord Kircudbright v Lady Kircudbright* (1802) 8 Ves 51; *Taylor v Taylor* (1875) LR 20 Eq 155; *Re Scott, Langton v Scott* [1903] 1 Ch 1, CA. See the Administration of Estates Act 1925 s 47(1)(iii) (reprinted in the Intestates' Estates Act 1952 Sch 1; and repealed as regards deaths after 1995:

see note 1 supra), under which property settled for the benefit of the child includes any life or less interest and property covenanted to be paid or settled: see PARA 605 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTTESTATE AFTER 1952/(ii) Rights of Issue under the Statutory Trusts/607. Extent of the doctrine.

607. Extent of the doctrine.

The doctrine relating to advances applies on the partial intestacy of a person dying before 1996¹, and in such a case benefits taken by children or remoter issue under the will have to be brought into account². Advances by a mother, where she is the intestate, must be brought into account³. A widow is not entitled to the benefit of the doctrine for the purpose of ascertaining the amount of her share of her intestate husband's estate, for the intention is merely to secure equality among the children⁴. Children of the intestate bring into account all advances made by him at a value determined as at his death in accordance with the requirements of the personal representative⁵. These provisions apply where all the provisions of a will, including the appointment of an executor, fail, for that is a total intestacy⁶.

Advances are taken without interest up to the date of the intestate's death, but from the death (in as much as the distribution is referred back to the actual date of the death) interest is allowed⁷.

1 See PARA 606 note 1 ante.

2 See PARA 615 post.

3 See the Administration of Estates Act 1925 s 47(1)(iii) (reprinted in the Intestates' Estates Act 1952 s 4, Sch 1; and repealed as regards deaths after 1995: see PARA 606 note 1 supra). This appears to overrule *Holt v Frederick* (1726) 2 P Wms 356.

4 *Lord Kircudbright v Lady Kircudbright* (1802) 8 Ves 51. As to valuation see PARA 605 text to note 8 ante.

5 See the Administration of Estates Act 1925 s 47(1)(iii) (repealed: see note 3 supra); and cf the Trustee Act 1925 s 22(3) (see TRUSTS vol 48 (2007 Reissue) PARA 1054). Remoter issue taking in substitution for a child bring into account advances made to their parent: see the Administration of Estates Act 1925 s 47(1)(i) (as amended), (iii) (repealed: see note 3 supra). As to collaterals see PARA 612 post.

6 See *Re Ford, Ford v Ford* [1902] 2 Ch 605, CA.

7 *Stewart v Stewart* (1880) 15 ChD 539 at 545 per Jessel MR. As to valuation see PARA 605 text to note 8 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTTESTATE AFTER 1952/(ii) Rights of Issue under the Statutory Trusts/608. Receipts by minors.

608. Receipts by minors.

A minor who is married has power to give valid receipts for the income of his or her share or interest¹, and personal representatives² may permit any minor contingently interested to have

the use and enjoyment of any personal chattels³ in such manner and subject to such conditions, if any, as they may consider reasonable, and without being liable to account for any consequential loss⁴. Where the trusts for the issue fail by the death of all before attaining an absolutely vested interest, the residuary estate together with all accumulations of income, or so much of it as has not been paid or applied under any power affecting it, is distributed as if the intestate left no issue surviving him⁵.

1 Administration of Estates Act 1925 s 47(1)(ii). Cf the Law of Property Act 1925 s 21. See further CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 40.

2 For the meaning of 'personal representative' see PARA 4 ante.

3 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

4 Administration of Estates Act 1925 s 47(1)(iv).

5 Ibid s 47(2)(a). In these circumstances, in Pt IV (ss 45-52) (as amended), references to the intestate 'leaving no issue' must be construed as 'leaving no issue who attain an absolutely vested interest' (s 47(2)(b)); and references to the intestate 'leaving issue' or 'leaving a child or other issue' must be construed as 'leaving issue who attain an absolutely vested interest' (s 47(2)(c)).

UPDATE

608 Receipts by minors

TEXT AND NOTE 1--Administration of Estates Act 1925 s 47(1)(ii) amended: Civil Partnership Act 2004 Sch 4 para 8.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/ (iii) Rights of other Relatives/609. Parents where there is a surviving spouse.

(iii) Rights of other Relatives

609. Parents where there is a surviving spouse.

Where the intestate¹ leaves a spouse who survives the intestate by the period of 28 days beginning with the date on which the intestate died² or, as regards deaths before 1995, where the intestate leaves a surviving spouse³ and no issue, but leaves parents or a parent⁴ (whether or not brothers or sisters of the intestate or their issue also survive), the parent or parents take half the residuary estate, less the personal chattels⁵ and the fixed net sum⁶, if there are two parents, in equal shares, absolutely⁷.

1 For the meaning of 'intestate' see PARA 555 note 1 ante.

2 See the Administration of Estates Act 1925 s 46(2A) (as added in relation to deaths on or after 1 January 1996); and PARA 591 ante.

3 Where the intestate and the intestate's spouse have died in circumstances rendering it uncertain which of them survived the other, the spouse will not be deemed to have survived, even if younger than the intestate: see PARA 591 note 7 ante.

4 See PARA 591 note 4 ante.

5 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

6 As to the fixed net sum see PARA 591 note 11 ante.

7 Administration of Estates Act 1925 s 46(1)(i), Table para (3)(b)(i) (substituted by the Intestates' Estates Act 1952 s 1(2); and amended by the Family Provision Act 1966 s 1(2)(a)).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/ (iii) Rights of other Relatives/610. Parents where there is no surviving spouse.

610. Parents where there is no surviving spouse.

Where the intestate¹ leaves no husband or wife who survives the intestate by the period of 28 days² or, in the case of deaths before 1996 where the intestate leaves no surviving spouse³ and leaves a parent or parents⁴ but no issue, the parents take the residuary estate in equal shares absolutely; or if there is only one that parent takes the whole absolutely⁵. The parents to take must be relations in blood and therefore step-parents and parents by marriage are excluded. The rights of succession to a legitimated person dying intestate and the rights of the mother of an illegitimate child dying intestate are considered elsewhere⁶.

1 For the meaning of 'intestate' see PARA 555 note 1 ante.

2 See the Administration of Estates Act 1925 s 46(2A) (as added in relation to deaths on or after 1 January 1996); and PARA 591 ante.

3 See PARAS 591, 609 ante.

4 See PARA 591 note 4 ante.

5 Administration of Estates Act 1925 s 46(1)(iii), (iv) (amended by the Intestates' Estates Act 1952 s 1(3) (a)).

6 See PARA 588 ante; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/ (iii) Rights of other Relatives/611. Other relatives where there is a surviving spouse.

611. Other relatives where there is a surviving spouse.

Where the intestate¹ leaves a husband or wife who survives the intestate by the period of 28 days² or, in the case of deaths before 1996 where the intestate leaves a surviving spouse³ and neither issue nor parent but leaves a brother or sister of the whole blood or issue of a brother or sister of the whole blood⁴, half the residuary estate, less the personal chattels⁵ and the fixed net sum⁶, is held on the statutory trusts⁷ for the brothers and sisters of the whole blood⁸. Where the intestate leaves no issue and no parent or brother or sister of the whole blood, or issue of such a brother or sister, any surviving spouse takes to the exclusion of any of the intestate's relations⁹.

- 1 For the meaning of 'intestate' see PARA 555 note 1 ante.
- 2 See the Administration of Estates Act 1925 s 46(2A) (as added in relation to deaths on or after 1 January 1996); and PARA 591 ante.
- 3 See PARAS 591, 609 ante.
- 4 See PARA 591 note 5 ante.
- 5 For the meaning of 'personal chattels' see PARA 591 note 10 ante.
- 6 As to the fixed net sum see PARA 591 note 11 ante.
- 7 See PARA 612 post.
- 8 Administration of Estates Act 1925 s 46(1)(i), Table para (3)(b)(ii) (substituted by the Intestates' Estates Act 1952 s 1(2); and amended by the Family Provision Act 1966 s 1(2)(a)).
- 9 See PARA 591 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/ (iii) Rights of other Relatives/612. Other relatives where there is no surviving spouse.

612. Other relatives where there is no surviving spouse.

Where the intestate does not leave a spouse who survives by the period of 28 days beginning with the date of the intestate's death¹ and leaves neither issue nor parent then the residuary estate goes to the following persons living at the intestate's death and in the following order and manner: (1) brothers and sisters of the whole blood; (2) brothers and sisters of the half blood; (3) grandparents; (4) uncles and aunts of the whole blood; (5) uncles and aunts of the half blood². With the exception of grandparents who, like parents, must take absolutely, these classes of relatives take upon trusts³ corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account), as if such classes of relatives were substituted for issue in those trusts⁴. Accordingly, if there survive the intestate members of any one of the classes, or (except in the case of grandparents) descendants, however remote, of members who have predeceased the intestate, they take per stirpes⁵ to the exclusion of every class later in the list⁶.

Throughout these provisions a husband and wife are to be treated as two persons⁷. A direction by a testator that his estate is not to go to any of the persons entitled under the foregoing provisions is ineffective if he died intestate, for he cannot override the law⁸, but he may direct that, in case of his dying intestate, some persons included are not to take⁹.

- 1 See the Administration of Estates Act 1925 s 46(2A) (as added in relation to deaths on or after 1 January 1996); and PARA 591 ante. Where the intestate died before 1996 there is no survival contingency and a spouse who merely survives the intestate by however short a period is entitled under the intestacy rules: see PARA 591 ante. For the meaning of 'intestate' see PARA 555 note 1 ante.
- 2 Ibid s 46(1)(v) (amended by the Intestates' Estates Act 1952 s 1(3)(b)).
- 3 For the statutory trusts for issue see PARA 603 et seq ante.
- 4 Administration of Estates Act 1925 s 47(3). Where the residuary estate of an intestate or any part of it is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, it must be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts were repeated with the

substitution of references to the members or member of that class for references to the children or child of the intestate: s 47(3). An additional subsection (s 47(5)) added by the Intestates' Estates Act 1952 ss 1(3)(c), 4, was repealed by the Family Provision Act 1966 s 9. The classes and the issue in these trusts include illegitimate, legitimate and adopted persons: see PARAS 588-589 ante. As to a posthumous child see PARA 604 ante; as to the power of children after marriage to give receipts see PARA 608 ante; and as to the power of personal representatives to put a minor in possession of personal chattels see PARA 608 ante.

5 As to the meaning of 'per stirpes' see PARA 604 note 3 ante.

6 The effect of the foregoing provisions is shown in PARA 619 post. Even where the intestate died before 1996, the provisions requiring the issue of the intestate to bring advances into hotchpot or, in the case of partial intestacy, to bring benefits under the will into account did not apply to collaterals: see the Administration of Estates Act 1925 ss 47(3), 49(1)(a) (amended by the Intestates' Estates Act 1952 s 3, and set out as amended in Sch 1). The Administration of Estates Act 1925 s 49(1)(a) was abolished in relation to the issue of an intestate dying after 1995: see PARA 605 ante.

7 Ibid s 46(2). At common law a husband and wife were regarded as one person, but from 1883 to 1925 this was a rule of construction only and readily gave way to any contrary intention, and from 1 January 1926 it was abolished: see the Law of Property Act 1925 s 37; and REAL PROPERTY vol 39(2) (Reissue) PARA 228.

8 *Johnson v Johnson* (1841) 4 Beav 318.

9 *Bund v Green* (1879) 12 ChD 819, such a direction being construed as an implied gift to the others. However, it may be construed otherwise and the question is purely one of construction of the will: see *Re Holmes, Holmes v Holmes* (1890) 62 LT 383.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(iv) Rights of the Crown and the Duchies/613. Bona vacantia.

(iv) Rights of the Crown and the Duchies

613. Bona vacantia.

If no person takes an absolute interest the Crown or the Duchy of Lancaster or the Duke of Cornwall for the time being, as the case may be, takes the intestate's residuary estate as bona vacantia, and in lieu of any right to escheat¹, and does so by statutory and not by prerogative right². Power is reserved to the Crown or the Duchy or the Duke to provide for the intestate's dependants, whether kindred or not, and other persons for whom the intestate might reasonably have been expected to make provision, according to the existing practice³.

1 Administration of Estates Act 1925 s 46(1)(vi). See also PARA 652 et seq post. Bona vacantia are jura regalia, and the right to them within the Duchy of Lancaster is vested in the Crown by a separate title and within the Duchy of Cornwall is vested in the Duke of Cornwall: see CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq. The jura regalia relating to property in the County Palatine of Durham have been revested in the Crown: see CROWN PROPERTY vol 12(1) (Reissue) PARA 298. As to proceedings by the Crown to get in an estate passing to it as bona vacantia, and as to the procedure in obtaining a grant to the Treasury Solicitor or other Crown nominee on behalf of the Crown see PARA 170 et seq ante. As to the rights of next of kin who subsequently establish their claim see PARA 172 ante.

2 *Re Mitchell, Hatton v Jones* [1954] Ch 525, [1954] 2 All ER 246. As to what are bona vacantia within the Crown's prerogative right see *A-G of Ontario v Mercer* (1883) 8 App Cas 767 at 778, PC; and CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq.

3 Administration of Estates Act 1925 s 46(1)(vi). Cf para 657 post. The Inheritance (Provision for Family and Dependents) Act 1975 (see PARA 665 et seq post) applies to claims against the Crown in some cases where, in the nature of things, its predecessor legislation could not have applied.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(iv) Rights of the Crown and the Duchies/614. When right to bona vacantia arises.

614. When right to bona vacantia arises.

The Crown's right to take as bona vacantia will be defeated if the personal representatives or any other person succeed after the intestate's death in obtaining a first registration of land forming part of the intestate's estate¹. Similarly, a transfer of registered land for valuable consideration will defeat the Crown's right to take as bona vacantia². The property in this country of a foreigner dying abroad intestate and without relatives of the foregoing classes goes to the Crown if, by the law of domicile, the foreign state claims as bona vacantia³, but to the foreign state if the latter claims as heir or successor under its own law⁴. In the case of a partial intestacy the executor may still compete with the next of kin or the Crown, but the onus is on the executor to show that it is intended by the will that he is to take beneficially⁵.

1 See the Land Registration Act 1925 s 5. See also *Re Suarez (No 2)* [1924] 2 Ch 19; *Morelle Ltd v Wakeling* [1955] 2 QB 379 at 409-411, [1955] 1 All ER 708 at 719-721, CA (overruled but not on this point in *A-G v Parsons* [1956] AC 421, [1956] 1 All ER 65, HL).

2 See the Land Registration Act 1925 s 20 (as amended).

3 *Re Barnett's Trusts* [1902] 1 Ch 847; *Re Bell* (1908) 52 Sol Jo 600; *Re Musurus* [1936] 2 All ER 1666.

4 *Re Maldonado, State of Spain v Treasury Solicitor* [1954] P 223, [1953] 2 All ER 1579, CA. See also PARA 208 ante; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 443 et seq.

5 See the Administration of Estates Act 1925 s 49(1)(b) (as amended); and PARA 618 post.

UPDATE

614 When right to bona vacantia arises

NOTES 1, 3--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(v) Partial Intestacy/615. History.

(v) Partial Intestacy

615. History.

Before 1926 there was no provision for persons taking under the will to bring their benefits into account when claiming under a partial intestacy¹. This led to anomalies which it is thought were intended to be corrected in 1925². It was then provided that where any person died leaving a will effectively disposing of part of his property the part of the Administration of Estates Act

1925 concerned with the distribution of the residuary estate³ should have effect as respects the part of his property not so disposed of⁴, subject to the provisions contained in the will and subject to modifications⁵. The first modification⁶ has given rise to trouble in its application of the hotchpot principle⁷. The second modification provided that the personal representative should, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under that part of the Act⁸ in respect of the part of the estate not expressly disposed of unless it appeared by the will that the personal representative was intended to take that part beneficially⁹.

1 See *Re Young, Young v Young*[1951] Ch 185 at 189, [1950] 2 All ER 1040 at 1042; *Re Roby, Howlett v Newington*[1908] 1 Ch 71, CA.

2 See the Administration of Estates Act 1925 s 49 (as amended), criticised by Danckwerts J in *Re Morton, Morton v Warham*[1956] Ch 644 at 647, [1956] 3 All ER 259 at 260.

3 I.e. the Administration of Estates Act 1925 Pt IV (ss 45-52) (as originally enacted). See further PARA 618 post.

4 See PARA 585 ante.

5 See the Administration of Estates Act 1925 s 49 (as amended).

6 See PARA 616 post.

7 The hotchpot provisions in the intestacy rules have been abolished in relation to deaths on or after 1 January 1996: see PARA 605 note 4 ante.

8 I.e. under the Administration of Estates Act 1925 Pt IV (as originally enacted).

9 See *ibid* s 49(1)(b); and PARA 618 post. As to a third modification see PARA 617 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(v) Partial Intestacy/616. The hotchpot modification.

616. The hotchpot modification.

The hotchpot modification¹ provides that the requirements as to bringing property into account should apply to any beneficial interests acquired by any issue² of the deceased under the deceased's will, but not to beneficial interests so acquired by any other persons³. 'The requirements' in question are those referring⁴ to money or property paid by way of advancement or on marriage⁵. The provision does not require legacies or shares of residue to be brought into account⁶. However, it has always been construed as if it had that effect⁷ so that all beneficial interests taken by issue under the will have to be brought into account⁸, and if a gift to a beneficiary and his children has to be brought into account that is to be treated as a gift of the capital of the interest in which the beneficiary and his children have successive interests⁹. Where, however, a life or less interest has to be brought into account and the remaining beneficial interests in the fund do not together amount to an entire interest of a beneficiary and his issue, the life or less interest has to be brought into account at its actuarial value¹⁰.

1 The hotchpot provisions in the intestacy rules have been abolished in relation to deaths on or after 1 January 1996: see PARA 605 note 4 ante.

2 'Issue' is to be contrasted with 'child' in the Administration of Estates Act 1925 s 47(1)(iii) (repealed in relation to deaths on or after 1 January 1996) (see PARA 605 ante): *Re Morton, Morton v Warham* [1956] Ch 644 at 648, [1956] 3 All ER 259 at 261 per Danckwerts J.

3 See the Administration of Estates Act 1925 s 49(1)(a) (amended by the Intestates' Estates Act 1952 s 3, and set out in amended form in Sch 1 (see s 4); and repealed in relation to deaths on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 1(2)(b), (3), 5, Schedule).

4 There were no such requirements before the Administration of Estates Act 1925, and no others in it: see PARA 615 ante; and note 8 infra.

5 See *ibid* s 47(1)(iii) (repealed in relation to deaths on or after 1 January 1996); and PARA 605 ante.

6 See *Re Grover's Will Trusts, National Provincial Bank Ltd v Clarke* [1971] Ch 168 at 174, [1970] 1 All ER 1185 at 1187 per Pennycuik J.

7 The limitation suggested in the first part of the judgment in *Re Grover's Will Trusts, National Provincial Bank Ltd v Clarke* [1971] Ch 168, [1970] 1 All ER 1185, namely that issue do not have to bring into account legacies or shares of residue, was not applied in that case, and does not seem ever to have been argued, presumably because of the effect of the earlier decisions.

8 *Re Young, Young v Young* [1951] Ch 185, [1950] 2 All ER 1040; *Re Grover's Will Trusts, National Provincial Bank Ltd v Clarke* [1971] Ch 168, [1970] 1 All ER 1185. The Administration of Estates Act 1925 s 49(1)(a) (repealed: see note 3 supra) was amended by the Intestates' Estates Act 1952 s 3(2) so as expressly to confine the requirements to those in the Administration of Estates Act 1925 s 47 (as amended), but this must always have been the effect of s 49(1)(a). See note 4 supra.

9 See note 8 supra.

10 *Re Morton, Morton v Warham* [1956] Ch 644, [1956] 3 All ER 259, explained in *Re Grover's Will Trusts, National Provincial Bank Ltd v Clarke* [1971] Ch 168 at 178, [1970] 1 All ER 1185 at 1190 per Pennycuik J. The date of such valuation is unclear: *Re Grover's Will Trusts, National Provincial Bank Ltd v Clarke* supra at 179 and at 1191. See also PARA 535 ante, and cf para 605 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(v) Partial Intestacy/617. Future interests.

617. Future interests.

Similar difficulties attend the application of the provisions of the Administration of Estates Act 1925 relating to partial intestacies¹, to future interests created by the will which fall to be distributed under a partial intestacy. Such a case has to be distinguished from the case where a testator fails altogether to dispose of some specific property of his, not arising in consequence of the will². In the latter case, subject to the provisions of the will, the statutory trusts for sale³ will apply⁴. In the former case the statutory trusts for sale do not apply, and the interest does not have to be sold, for it cannot necessarily be asserted at the date of testator's death that he is partially intestate, nor did the legislature contemplate the payment or recoupment of testamentary expenses out of an item of future property or intend to refer⁵ to reversionary interests other than those properly so called forming part of the intestate's estate⁶. Where, however, the testator's will gives a life interest in residue without providing for what is to happen afterwards, and there is a partial intestacy of the remainder on the widow's life interest, she is entitled immediately to the statutory legacy, because the provisions relating to partial intestacy⁷, when read with the provisions as to the distribution of residue on an intestacy⁸, do not provide for this to be payable to her personal representatives as part of her estate on her death, but to her, and the statutory charge is not merely a charge on the reversion as a separate asset⁹.

In relation to deaths after 1952 and before 1996 the fixed net sum payable to a surviving spouse under a partial intestacy is payable less the value of any beneficial interests taken under the will, and no fixed net sum is payable if the value of these exceeds the amount of the fixed net sum¹⁰. After 1952 references to beneficial interests acquired under a will are construed as including a beneficial interest acquired under a general but not a special power of appointment¹¹.

1 Ie the Administration of Estates Act 1925 s 49 (as amended). As to the difficulties relating to hotchpot see PARA 616 ante.

2 See PARAS 585, 615 ante.

3 Ie under the Administration of Estates Act 1925 s 33 (as amended): see PARAS 555-556 ante.

4 As to the respective application of *ibid* s 33 (as amended) and s 49 (as amended) see PARA 585 ante.

5 Ie in *ibid* s 33 (as amended).

6 *Re McKee Public Trustee v McKee* [1931] 2 Ch 145 at 148, 150, 160, CA. The terms of an express trust for sale, if there is one, override any statutory trusts for sale in any event: *Re McKee, Public Trustee v McKee* *supra* at 149, 159.

7 See note 1 *supra*.

8 Ie the Administration of Estates Act 1925 s 46 (as amended).

9 See *Re Bowen-Buscarlet's Will Trusts, Nathan v Bowen-Buscarlet* [1972] Ch 463 at 467-468, [1971] 3 All ER 636 at 638-639 per Goff J, following *Re Douglas' Will Trusts, Lloyds Bank Ltd v Nelson* [1959] 2 All ER 620, [1959] 1 WLR 744 (affd on another point [1959] 3 All ER 785, [1959] 1 WLR 1212, CA), and not following *Re McKee, Public Trustee v McKee* [1931] 2 Ch 145 on this point. The amendments of the Administration of Estates Act 1925 s 49 by the Intestates' Estates Act 1952 ss 1, 3, may also have affected the position.

10 Administration of Estates Act 1925 s 49(1)(aa) (added by the Intestates' Estates Act 1952 s 3(2), and set out in amended form in Sch 1; amended by the Family Provision Act 1966 s 1; and repealed in relation to deaths on or after 1 January 1996 by the Law Reform (Succession) Act 1995 ss 1(2)(b), (3), 5, Schedule).

11 Administration of Estates Act 1925 s 49(2) (added by the Intestates' Estates Act 1952 s 3(3), and set out in amended form in Sch 1; and repealed in relation to deaths on or after 1 January 1996 by the Law Reform (Succession) Act 1995 ss 1(2)(b), (3), 5, Schedule).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(v) Partial Intestacy/618. Trusteeship.

618. Trusteeship.

The personal representative¹ holds the undisposed of estate, subject to his rights and powers for purposes of administration, in trust for the persons entitled on an intestacy under the statutory provisions already set out² unless it appears from the will³ that he was to take beneficially⁴. The onus is on the personal representative to show that he is so entitled, and this appears to be so even when the Crown is entitled under the partial intestacy.

These provisions take effect subject to the provisions contained in the will⁵; but this means the provisions which remain operative and effective and does not include any provisions which become inoperative by virtue of a disclaimer⁶.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 See PARA 591 et seq ante.

3 For the meaning of 'will' see PARA 3 note 1 ante. See *Re Carville, Shone v Walthamstow Borough Council* [1937] 4 All ER 464 ('residue to be disposed of as my executors shall think fit'; executors did not take beneficially); and see also *Re Skeats, Thain v Gibbs*, [1936] 2 All ER 298. Cf the cases cited in PARA 639 post, with reference to the law before 1926.

4 Administration of Estates Act 1925 s 49(1)(b). As to the effect of a partial intestacy in certain circumstances on the right of a surviving spouse to have a life interest redeemed see PARA 598 ante.

5 See PARA 615 ante; and ibid s 49(1) (amended by the Intestates' Estates Act 1952 s 3).

6 *Re Sullivan, Dunkley v Sullivan* [1930] 1 Ch 84 (where, by disclaiming a life interest under the will, the widow avoided the effect of a provision that royalties should be treated as capital, and was held entitled to receive them as income under her life interest as on an intestacy). See also *Re Thornber, Crabtree v Thornber* [1937] Ch 29, [1936] 2 All ER 1594, CA (gift of annuity out of income of residue to testator's widow; trust for accumulation of surplus income for 21 years or her life; gift of capital and accumulated income at expiration of that period to testator's children; testator died without issue: trust for accumulation inoperative).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(vi) Summary of Distribution on Intestacy/619. Distribution on death after 1952 where there is a surviving spouse.

(vi) Summary of Distribution on Intestacy

619. Distribution on death after 1952 where there is a surviving spouse.

Where a person dies intestate on or after 1 January 1953 his estate is to be distributed or held on trusts in the following manner.

The surviving spouse takes the interests described below, but in the case of the death of a person intestate on or after 1 January 1996 such rights are contingent on surviving the intestate by the period of 28 days¹.

When the intestate leaves issue or relatives of any of the classes described below the surviving spouse takes the following interests:

- (1) The surviving spouse takes the personal chattels² absolutely³.
- (2) The surviving spouse takes the fixed net sum⁴ absolutely⁵.
- (3) Subject to the above, the estate is distributed or held on trust as follows (note that if there are relatives of any class there is no need to proceed to a subsequent class):
 1. (a) Issue: one-half to the surviving spouse for life and then to the issue on the statutory trusts⁶; other half to the issue on the statutory trusts⁷.
 2. (b) Parent or parents: one-half to the surviving spouse absolutely⁸; other half to the parent (or parents equally) absolutely⁹.
 3. (c) Brothers and sisters of the whole blood (including issue of deceased ones, that is to say, nephews and nieces): one-half to the surviving spouse absolutely¹⁰; other half to the brothers and sisters on the statutory trusts¹¹.
 4. (d) Brothers and sisters of the half blood (including issue of deceased ones): all to the surviving spouse absolutely¹².
 5. (e) Grandparents: all to the surviving spouse absolutely¹³.
 6. (f) Uncles and aunts of the whole blood (including issue of deceased ones): all to the surviving spouse absolutely¹⁴.

7. (g) Uncles and aunts of the half blood (including issue of deceased ones): all to the surviving spouse absolutely¹⁵.

Where the intestate does not leave issue or relatives of any of the classes described above the surviving spouse takes the entire estate¹⁶.

1 See the Administration of Estates Act s 46(2A) (as added in relation to deaths on or after 1 January 1996); and PARA 591 ante. As to commorientes see also PARA 146 ante.

2 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

3 Administration of Estates Act 1925 s 46(1)(i) (substituted by the Intestates' Estates Act 1952 s 1), Administration of Estates Act 1925 s 46(1), Table paras (2), (3) (Table paras (2), (3) amended by the Family Provision Act 1966 s 1; the Administration of Justice Act 1977 s 28(1)(a); and the Statute Law (Repeals) Act 1981); see PARAS 591-592 ante.

4 As to the fixed net sum see PARAS 591 note 11, 592 note 4 ante.

5 Administration of Estates Act 1925 s 46(1)(i), Table paras (2), (3) (as substituted and amended: see note 3 supra). See PARAS 591-592 ante.

6 Ibid s 46(1)(i), Table para (2)(a) (as substituted and amended: see note 3 supra): see PARA 592 ante. As to the statutory trusts see PARA 603 ante.

7 Ibid s 46(1)(i), Table para (2)(b) (as substituted and amended: see note 3 supra): see PARA 592 ante. If the trusts for the issue fail in the lifetime of the surviving spouse, the residuary estate devolves as if the intestate had died without leaving issue: see s 47(2)(a); and PARA 592 ante.

8 Ibid s 47(1)(i), Table para (3)(a) (as substituted and amended: see note 3 supra): see PARA 591 ante.

9 Ibid s 47(1)(i), Table para (3)(b)(i) (as substituted and amended: see note 3 supra): see PARA 609 ante. The parents do not take on the statutory trusts.

10 Ibid s 46(1)(i), Table para (3)(a) (as substituted and amended: see note 3 supra): see PARA 591 ante.

11 Ibid s 46(1)(i), Table para (3)(b)(ii) (as amended: see note 3 supra): see PARA 611 ante. Nephews or nieces take deceased parent's share. If all brothers and sisters are dead, nephews and nieces take per stirpes. As to the meaning of 'per stirpes' see PARA 604 note 3 ante.

12 Ibid s 46(1)(i), Table para (1) (as substituted: see note 3 supra): see PARA 591 ante.

13 Ibid s 46(1)(i), Table para (1) (as substituted: see note 3 supra): see PARA 591 ante. Grandparents do not take on the statutory trusts.

14 Ibid s 46(1)(i), Table para (1) (as substituted: see note 3 supra): see PARA 591 ante.

15 Ibid s 46(1)(i), Table para (1) (as substituted: see note 3 supra): see PARA 591 ante.

16 Ibid s 46(1)(i), Table para (1) (as substituted: see note 3 supra): see PARA 591 ante. Second or more remote cousins have no rights.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(2) DEATHS INTESTATE AFTER 1952/(vi) Summary of Distribution on Intestacy/620. Distribution on death after 1952 where there is no surviving spouse.

620. Distribution on death after 1952 where there is no surviving spouse.

Where a person dies intestate on or after 1 January 1953 with no surviving spouse¹ his estate is to be distributed or held on trusts as follows (note that if there are relatives of any class there is no need to proceed to a subsequent class):

- (1) Issue: all to the issue on the statutory trusts².
- (2) Parents: all to the parent (or parents equally) absolutely³.
- (3) Brothers and sisters of the whole blood (including issue of deceased ones, that is to say, nephews and nieces): all to the brothers and sisters on the statutory trusts⁴.
- (4) Brothers and sisters of the half blood (including issue of deceased ones): all to the brothers and sisters on the statutory trusts⁵.
- (5) Grandparents: all to the grandparent (or grandparents equally) absolutely⁶.
- (6) Uncles and aunts of the whole blood (including issue of deceased ones): all to the uncles and aunts on the statutory trusts⁷.
- (7) Uncles and aunts of the half blood (including issue of deceased ones): all to the uncles and aunts on the statutory trusts⁸.
- (8) No relative of the above classes: all to the Crown, the Duchy of Lancaster or the Duke of Cornwall⁹.

1 In the case of the death of a person intestate on or after 1 January 1996 the spouse must survive the intestate by the period of 28 days: see the Administration of Estates Act s 46(2A) (as added in relation to deaths on or after 1 January 1996); and PARA 591 ante. As to distribution where there is a surviving spouse see PARA 619 ante. As to commorientes see also PARA 146 ante.

2 Ibid s 46(1)(ii): see PARA 603 ante.

3 Ibid s 46(1)(iii), (iv) (amended by the Intestates' Estates Act 1952 s 1): see PARA 610 ante. The parents do not take on the statutory trusts.

4 Administration of Estates Act 1925 s 46(1)(v), first head: see PARA 612 ante. Nephews or nieces take their deceased parent's share. If all brothers and sisters are dead, nephews and nieces take per stirpes. As to the meaning of 'per stirpes' see PARA 604 note 3 ante.

5 Ibid s 46(1)(v), second head: see PARA 612 ante.

6 Ibid s 46(1)(v), third head: see PARA 612 ante. Grandparents do not take on the statutory trusts.

7 Ibid s 46(1)(v), fourth head: see PARA 612 ante. Cousins take their deceased parent's share. If all uncles and aunts are dead, the cousins take per stirpes.

8 Ibid s 46(1)(v), fifth head (amended by the Intestates' Estates Act 1925 s 1): see PARA 612 ante.

9 Administration of Estates Act 1925 s 46(1)(vi): see PARA 613 ante. Second or more remote cousins have no rights.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTESTATE AFTER 1925 AND BEFORE 1953/621. Surviving spouse's absolute interests.

(3) DEATH INTESTATE AFTER 1925 AND BEFORE 1953

621. Surviving spouse's absolute interests.

Where an intestate dying after 1925 but before 1953 left a husband or wife, whether there were issue or not, the surviving spouse took all personal chattels¹ absolutely and a sum of

£1,000 absolutely² free of death duties and costs and with interest³ at 5 per cent per annum from the date of death until payment or appropriation⁴. The surviving spouse took an absolute interest in the whole estate where under the provisions in favour of the relatives of the deceased⁵ no person took an absolute vested interest⁶.

1 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

2 By the Administration of Estates Act 1925 s 46(1)(i) (as originally enacted) this sum is expressed to be charged on the residuary estate, but is in effect an absolute gift: cf para 591 note 11 ante.

3 Such interest is a charge on the corpus of the estate and not upon income: *Re Saunders, Public Trustee v Saunders*[1929] 1 Ch 674. As to the position as regards interest on the corresponding sums payable in the case of deaths after 1952 see PARA 591 text and note 15 ante.

4 Administration of Estates Act 1925 s 46(1)(i) (as originally enacted). As to commorientes see PARA 146 ante.

5 As to these provisions see PARA 626 post.

6 See the Administration of Estates Act 1925 s 46(1)(v) (as originally enacted).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTESTATE AFTER 1925 AND BEFORE 1953/622. Surviving spouse's life interest.

622. Surviving spouse's life interest.

Where an intestate dying after 1925 but before 1953 left no issue¹ the surviving spouse was entitled (in addition to the absolute rights as to personal chattels and the capital sum of £1,000²) to a life interest in the whole residuary estate³. If the intestate left issue the surviving spouse took a life interest in half only, but if the trusts of the other half failed in the lifetime of the surviving spouse, he or she took that other half for the residue of his or her life⁴.

1 See PARAS 588, 589, 591 note 3 ante.

2 See PARA 621 ante.

3 Administration of Estates Act 1925 s 46(1)(i)(a) (as originally enacted). See also note 4 infra. As to commorientes see PARA 146 ante.

4 Ibid s 46(1)(i)(b) (as originally enacted). Shortly stated, the trusts of the other half are for the issue who attain 21 or marry: see s 47(1) (as originally enacted). The position under s 46(1)(i)(a), (b) (as originally enacted), where the trusts for the issue fail, is curious. On the one hand, the definition of 'no issue' in s 47(2)(b) brings the position within s 46(1)(i)(a) (as originally enacted), and the surviving spouse takes a life interest in the whole residuary estate less the personal chattels and the £1,000. On the other hand, by s 46(1)(i)(b) (as originally enacted), he or she is expressly given a life interest in the half which the issue would have taken for the residue of his or her life and, as he or she already has a life interest in half under s 46(1)(i)(a) (as originally enacted), it follows that he or she takes half the net income until the trusts for the issue fail, and the whole net income from that time till death, together with (by s 47(2)(a)) the income for the period from death to the time of the failure of the trusts for issue and the accumulations of it, less any money paid or applied by way of advancement or maintenance. Of these two constructions it is submitted the latter must prevail.

UPDATE

622 Surviving spouse's life interest

NOTE 4--As to the 1925 Act s 47(1), see *Re DWS; Re EHS; TWGS V JMG* [2000] 2 All ER 83.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTTESTATE AFTER 1925 AND BEFORE 1953/623. Personal representative's power to redeem life interest.

623. Personal representative's power to redeem life interest.

While the life interest of a surviving spouse¹ was in possession², it could, with his or her consent where he or she was not the sole personal representative, or, where he or she was the sole personal representative³, with the leave of the court, be redeemed⁴ by the personal representative paying its capital value, reckoned according to tables⁵ selected by the personal representative, and the costs of the transaction, and the residuary estate might then be dealt with or distributed free from the life interest⁶. The capital sum had to be paid to the surviving spouse or persons deriving title under him or her⁷. The capital sum (including costs) could be raised by charging the residuary estate or any part of it (other than the personal chattels⁸) so far as it was not satisfied by the application of any part of the residuary estate⁹. The sum of £1,000¹⁰ or any part of it could be similarly raised or satisfied by appropriation¹¹.

1 See PARA 622 ante. As to commorientes see PARA 146 ante.

2 The life interest vests immediately on the death of the intestate: *Cooper v Cooper* (1874) LR 7 HL 53.

3 Where there is a life interest, the appointment of two administrators or a trust corporation as administrators is necessary (Supreme Court of Judicature (Consolidation) Act 1925 s 160(1) (repealed)). The Administration of Estates Act 1925 s 48(1) (as originally enacted) referred to 'personal representative' in the singular, so as to cover a sole executor or sole surviving administrator.

4 Ibid s 48(1) (as originally enacted).

5 Reference could be made to the tables in the Succession Duty Act 1853, Schedule (repealed), and to the tables of life insurance societies.

6 Administration of Estates Act 1925 s 48(1) (as originally enacted).

7 Ibid s 48(1) (as originally enacted).

8 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

9 Administration of Estates Act 1925 s 48(2)(b) (as originally enacted). As to the statutory powers of appropriation see PARA 573 et seq ante.

10 See PARA 621 ante.

11 Administration of Estates Act 1925 s 48(2)(a) (as originally enacted).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTTESTATE AFTER 1925 AND BEFORE 1953/624. Issue.

624. Issue.

The interests taken by issue upon the statutory trusts in the case of an intestate dying after 1925 but before 1953 were the same as are taken in the case of a death after 1952¹, except that the capital sum payable to any surviving spouse was only £1,000².

1 See PARA 603 et seq ante.

2 See the Administration of Estates Act 1925 s 46(1)(i), (ii) (as originally enacted).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTTESTATE AFTER 1925 AND BEFORE 1953/625. Parents.

625. Parents.

Where an intestate dying after 1925 but before 1953 left no issue but parents or a parent¹ then, subject to the interests of a surviving spouse, if any², the parents shared the residuary estate equally between them or, if there was only one, that one took the whole³. These were absolute interests⁴, since the statutory trusts could not be applicable to them. The parents to take had to be related by blood, so excluding step parents and parents by marriage⁵. The rights of the parents of a legitimated person dying intestate are considered elsewhere⁶.

1 As to the meaning of 'parent' see PARA 591 note 4 ante.

2 See PARA 622 ante. As to commorientes see PARA 146 ante.

3 Administration of Estates Act 1925 s 46(1)(iii), (iv) (as originally enacted).

4 See ibid s 46(1)(iii), (iv) (as originally enacted).

5 See PARA 588 ante.

6 See further PARA 588 note 2 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTTESTATE AFTER 1925 AND BEFORE 1953/626. Other relations.

626. Other relations.

Where an intestate dying after 1925 but before 1953 left no issue or parent then, subject to the interests of the surviving spouse, if any¹, the residuary estate went to the same persons and in the same order and on the same trusts (where applicable) as apply in the case of a death after 1952 where the intestate leaves neither spouse, issue nor parent².

1 See PARA 622 ante. As to commorientes see PARA 146 ante.

2 See the Administration of Estates Act 1925 s 46(1)(v) (as originally enacted), by which an order of succession applied similar to that set out in PARA 612 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTTESTATE AFTER 1925 AND BEFORE 1953/627. Rights of the Crown.

627. Rights of the Crown.

The rights of the Crown, which have not been affected by the Intestates' Estates Act 1952, are as already stated in relation to deaths after 1952¹.

- 1 See the Administration of Estates Act 1925 s 46(1)(vi); and PARAS 613-614 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTTESTATE AFTER 1925 AND BEFORE 1953/628. Partial intestacy.

628. Partial intestacy.

On the partial intestacy of a person dying after 1925 and before 1953 there is no provision for a surviving spouse to bring into account any beneficial interest under the will¹; nor was the requirement as to the bringing into account of the beneficial interests of issue under the will expressly extended to beneficial interests acquired by virtue of the exercise of a general power of appointment². The hotchpot provisions have been abolished altogether in relation to deaths after 1995³. Subject to these differences similar provisions apply in the case of deaths throughout the period since 1925⁴.

- 1 See PARA 615 et seq ante. As to commorientes see PARA 146 ante.

- 2 Ie there is no provision corresponding to that set out in PARA 617 text and note 11 ante.

- 3 Ie by the Law Reform (Succession) Act 1995 s 1(1): see PARA 615 et seq ante. As to hotchpot see WILLS vol 50 (2005 Reissue) PARA 688 et seq.

- 4 See the Administration of Estates Act 1925 s 49 (as originally enacted). As to the position where a surviving spouse takes a life interest under a will see PARA 617 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTTESTATE AFTER 1925 AND BEFORE 1953/629. Distribution on death after 1925 but before 1953 where there is a surviving spouse.

629. Distribution on death after 1925 but before 1953 where there is a surviving spouse.

Where a person died intestate on or after 1 January 1926 and before 1 January 1953 his estate is to be distributed or held on trust in the following manner.

Where the intestate leaves issue or relatives of any of the classes described below the surviving spouse takes the following interests:

- (1) The surviving spouse takes the personal chattels¹ absolutely².
 - (2) The surviving spouse takes £1,000 absolutely³.
 - (3) Subject to the above, the estate is distributed or held on trust as follows (note that if there are relatives of any class there is no need to proceed to a subsequent class):
8. (a) Issue: one-half to the surviving spouse for life and then to the issue on the statutory trusts; other half to the issue on the statutory trusts⁴;
 9. (b) Parent or parents: all to the surviving spouse for life⁵ and then to the parent (or parents equally) absolutely⁶;
 10. (c) Brothers and sisters of the whole blood (including issue of deceased ones, that is to say, nephews and nieces): all to the surviving spouse for life⁷ and then to the brothers and sisters on the statutory trusts⁸;
 11. (d) Brothers and sisters of the half blood (including issue of deceased ones): all to the surviving spouse for life⁹ and then to the brothers and sisters on the statutory trusts¹⁰;
 12. (e) Grandparents: all to the surviving spouse for life¹¹ and then to the grandparent (or grandparents equally) absolutely¹²;
 13. (f) Uncles and aunts of the whole blood (including issue of deceased ones): all to the surviving spouse for life¹³ and then to the uncles and aunts on the statutory trusts¹⁴;
 14. (g) Uncles and aunts of the half blood (including issue of deceased ones): all to the surviving spouse for life¹⁵ and then to the uncles and aunts on the statutory trusts¹⁶.

Where the intestate does not leave issue or relatives of any of the classes described above the surviving spouse takes the entire estate¹⁷.

1 For the meaning of 'personal chattels' see PARA 591 note 10 ante.

2 Administration of Estates Act 1925 s 46(1)(i). Throughout this paragraph references to this Act are to the Act as originally enacted. See PARA 621 ante. As to commorientes see PARA 146 ante.

3 Ibid s 46(1)(i).

4 Ibid s 46(1)(i)(b): see PARA 624 ante. If the trusts for issue fail in the lifetime of the spouse, he or she takes their half for the residue of his or her life: s 46(1)(i)(b).

5 Ibid s 46(1)(i)(a).

6 Ibid s 46(1)(iii), (iv): see PARA 625 ante. The parents do not take on the statutory trusts.

7 Ibid s 46(1)(i)(a).

8 Ibid s 46(1)(v), first head: see PARA 626 ante. Nephews or nieces take their deceased parent's share. If all brothers and sisters are dead, nephews and nieces take per stirpes. As to the meaning of 'per stirpes' see PARA 604 note 3 ante.

9 Administration of Estates Act 1925 s 46(1)(i)(a).

10 Ibid s 46(1)(v), second head: see PARA 626 ante.

11 Ibid s 46(1)(i)(a).

12 Ibid s 46(1)(v), third head: see PARA 626 ante. Grandparents do not take on the statutory trusts.

- 13 Ibid s 46(1)(i)(a).
- 14 Ibid s 46(1)(v), fourth head: see PARA 626 ante. Cousins take their deceased parent's share. If all the uncles and aunts are dead, the cousins take per stirpes.
- 15 Ibid s 46(1)(i)(a).
- 16 Ibid s 46(1)(v), fifth head: see PARA 626 ante.
- 17 Ibid s 46(1)(v), sixth head: see PARA 621 ante. Second or more remote cousins have no rights.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(3) DEATH INTESTATE AFTER 1925 AND BEFORE 1953/630. Distribution on death after 1925 but before 1953 where there is no surviving spouse.

630. Distribution on death after 1925 but before 1953 where there is no surviving spouse.

Where a person died intestate on or after 1 January 1926 and before 1 January 1953 with no surviving spouse¹ his estate is to be distributed or held on trust as follows (note that if there are relatives of any class there is no need to proceed to a subsequent class):

- (1) Issue: all to the issue on statutory trusts²;
- (2) Parents: all to the parent (or parents equally) absolutely³;
- (3) Brothers and sisters of the whole blood (including issue of deceased ones, that is to say, nephews and nieces): all to the brothers and sisters on the statutory trusts⁴;
- (4) Brothers and sisters of the half blood (including issue of deceased ones): all to the brothers and sisters on the statutory trusts⁵;
- (5) Grandparents: all to the grandparent (or grandparents equally) absolutely⁶;
- (6) Uncles and aunts of the whole blood (including issue of deceased ones): all to the uncles and aunts on the statutory trusts⁷;
- (7) Uncles and aunts of the half blood (including issue of deceased ones): all to the uncles and aunts on the statutory trusts⁸;
- (8) No relative of the above classes: all to the Crown, the Duchy of Lancaster or the Duke of Cornwall⁹.

1 As to distribution where there is a surviving spouse see PARA 629 ante. As to commorientes see PARA 146 ante.

2 Administration of Estates Act 1925 s 46(1)(ii). Throughout this paragraph references to this Act are to the Act as originally enacted. See PARA 624 ante.

3 Ibid s 46(1)(iii), (iv): see PARA 625 ante. The parents do not take on the statutory trusts.

4 Ibid s 46(1)(v), first head: see PARA 626 ante. Nephews or nieces take deceased parent's share. If all brothers and sisters are dead, nephews and nieces take per stirpes. For the meaning of 'per stirpes' see PARA 604 note 3 ante.

5 Ibid s 46(1)(v), second head: see PARA 626 ante.

6 Ibid s 46(1)(v), third head: see PARA 626 ante. Grandparents do not take on statutory trusts.

7 Ibid s 46(1)(v), fourth head: see PARA 626 ante. Cousins take their deceased parent's share. If all the uncles and aunts are dead, the cousins take per stirpes.

8 Ibid s 46(1)(v), fifth head: see PARA 626 ante.

9 Ibid s 46(1)(vi): see PARA 627 ante. Second or more remote cousins have no rights.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(i) Application of Old Rules in respect of Deaths after 1926/631. Entailed interests.

(4) DEATHS INTTESTATE BEFORE 1926

(i) Application of Old Rules in respect of Deaths after 1926

631. Entailed interests.

The rules of intestate succession, as enacted by the amended Administration of Estates Act 1925¹ do not affect the devolution of an entailed interest² as an equitable interest³; and accordingly the pre-1926 rules of descent continue to apply⁴. Entailed interests cannot be created after 1996⁵, but this does not affect the devolution of existing entailed interests⁶.

An entailed interest, like the former estate tail, is in certain circumstances liable to be barred by the execution of a disentailing assurance, which will defeat all subsequent interests in tail⁷. The same result may now be achieved under similar circumstances by the will of the tenant in tail in possession under the statutory power of disposing of an entailed interest by will⁸. On the failure of issue under the entail, the entailed interest will revert to the owner of the reversion expectant on the determination of the entailed interest and not to the Crown⁹. The owner of the reversion will be traced by the rules relating to deaths after 1925¹⁰.

1 See the Administration of Estates Act 1925 Pt IV (ss 45-52) (as amended); and, as to amendments see PARA 583 note 2 ante.

2 See PARA 584 text and notes 3, 6 ante. An interest in tail or in tail male or in tail female or in tail special could be created by way of trust in any property, real or personal, and is known as an entailed interest: see the Law of Property Act 1925 s 130(1) (repealed); and REAL PROPERTY vol 39(2) (Reissue) PARA 117 et seq.

3 Administration of Estates Act 1925 ss 45(2), 51(4) (repealed with savings by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

4 See PARA 584 ante. See, however, PARA 589 ante.

5 See the Trusts of land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

6 See ibid Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

7 See REAL PROPERTY vol 39(2) (Reissue) PARA 121 et seq.

8 See the Law of Property Act 1925 s 176; and WILLS vol 50 (2005 Reissue) PARA 671.

9 Com Dig, Escheat (A 1); Fitz Nat Brev 144. Before 1926 failure of an estate tail did not lead to an escheat. As to escheat see PARA 652 post.

10 There may be exceptional cases, eg where the estate tail is in freeholds and the owner of the reversion is a mentally disordered person and comes within the provisions of the Administration of Estates Act 1925 s 51(2) (as amended) (see PARA 633 post), or is a minor who dies without ever having been married (see s 51(3) (as amended); and PARA 634 post).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(i) Application of Old Rules in respect of Deaths after 1926/632. Heirs by purchase.

632. Heirs by purchase.

Under a limitation of real or personal property which before 1926 would, in the case of freehold land, have conferred on the heir an estate by purchase, the property devolves upon the person who would have been entitled as heir in respect of freehold land under the rules in force before 1926¹. This rule applies both to an heir general and an heir special², but only to limitations or trusts created by an instrument coming into operation after 1925, although the date of the deceased's death is immaterial³.

1 Law of Property Act 1925 s 132; Administration of Estates Act 1925 s 51(1); Law of Property (Amendment) Act 1924 s 9, Sch 9 (preserving, as regards the ascertainment of persons who are to take equitable interests as heirs by purchase, the Inheritance Act 1833, as amended by the Law of Property Amendment Act 1859 s 19; for the enactments preserved see PARA 639 et seq post). As to the distinction between taking by descent and by purchase see PARA 639 post.

2 Law of Property Act 1925 s 132(1). For the meaning of 'heir' see WILLS vol 50 (2005 Reissue) PARA 628.

3 Ibid s 132(2).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(i) Application of Old Rules in respect of Deaths after 1926/633. Mental disorder continuing from 1925 until death.

633. Mental disorder continuing from 1925 until death.

Where a person of unsound mind or defective living¹ and of full age on 1 January 1926 was before that date² entitled to a beneficial interest in freehold property³, and dies thereafter without having recovered his testamentary capacity and therefore has been unable since 1925 to make a will, the beneficial interest (not being an interest ceasing on his death)⁴ devolves without prejudice to any will of his⁵, in accordance with the general law⁶ in force before 1926⁷. This rule has been applied to exclude the rights of a person legitimated since 1926⁸ in spite of the express statutory provisions as to the rights of legitimated persons⁹. A person of unsound mind or defective is not deemed to have recovered his testamentary capacity unless his receiver has been discharged¹⁰. It is not, however, necessary in order to receive the benefit of this provision that a receiver be appointed, but the provision only relates to the descent of the beneficial interest to the heir, and the real estate must now bear its rateable share of the funeral and testamentary expenses, debts and liabilities¹¹.

1 'Person of unsound mind' includes a person of unsound mind whether so found or not, and in relation to a person of unsound mind not so found; and 'defective' includes every person affected by the provisions of the Lunacy Act 1890 s 116, as extended by the Mental Deficiency Act 1913 s 64 (both repealed: see now the Mental Health Act 1983 ss 94(2), 95; and MENTAL HEALTH vol 30(2) (Reissue) PARA 681 et seq), and for whose benefit a receiver has been appointed: Administration of Estates Act 1925 s 55(1)(viii).

2 *Re Bradshaw, Bradshaw v Bradshaw* [1950] Ch 582, [1950] 1 All ER 643, CA.

3 The exemption from the new provisions is confined to freehold property; leaseholds are expressly excluded: see the Administration of Estates Act 1925 s 51(2).

4 This is the wording of *ibid* s 1: see PARA 363 ante. The wording of the Land Transfer Act 1897 s 1(1) (repealed as to deaths after 1925), to which the land is virtually made subject was rather different: 'real estate is vested in any person without a right in any other person to take by survivorship'.

5 The mentally disordered person may have made an effective will before his illness or during a lucid interval before 1926.

6 General law means the general law of intestacy before 1926, so that the special custom of gavelkind which would in fact have applied before 1926 ceases to do so under these provisions, and the land devolves under the common law as at that date: *Re Higham, Higham v Higham* [1937] 2 All ER 17. As to gavelkind see PARA 663 post.

7 Law of Property (Amendment) Act 1924 s 9, Sch 9 (preserving in relation to lunatics and defectives the Inheritance Act 1833, as amended by the Law of Property Amendment Act 1859 s 19; for the enactments preserved see PARA 639 et seq post); Administration of Estates Act 1925 s 51(2) (amended by the Mental Treatment Act 1930 s 20(5); and the Mental Health Act 1959 s 149(2), Sch 8). The rule applied even if, by reason of the transitional provisions of the Law of Property Act 1925, the interest became after 1925 only an interest in the proceeds of sale of the real estate: *Re Bradshaw, Bradshaw v Bradshaw* [1950] Ch 582, [1950] 1 All ER 643, CA. As to real property sold before 1926 see also *Re Harding, Westminster Bank Ltd v Laver* [1934] Ch 271.

8 *Re Berrey, Lewis v Berrey* [1936] Ch 274.

9 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125 et seq.

10 Administration of Estates Act 1925 s 51(2) (as amended: see note 7 supra).

11 *Re Gates, Gates v Gates* [1930] 1 Ch 199.

UPDATE

633 Mental disorder continuing from 1925 until death

NOTE 1--1925 Act s 55(1)(viii) repealed: Mental Capacity Act 2005 Sch 6 para 5(3), Sch 7.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(i) Application of Old Rules in respect of Deaths after 1926/634. Minors dying without having married.

634. Minors dying without having married.

If after 1925 and before 1997 a minor who is equitably entitled under a settlement or will to a vested estate in fee simple or absolute interest in freehold land or in any property settled to devolve with it or as freehold land dies without having been married, the land or property devolves as if the minor's interest in it was an entailed interest¹. The provision applies to a minor entitled under an intestacy since in such a case there is a notional settlement. Upon the death of such a minor the land devolves on the person who would have been heir in tail under the old law if the minor's interest had been an estate in tail. If the heir in tail is a minor his interest is an entailed one until he attains full age or marries².

1 Administration of Estates Act 1925 s 51(3) (amended in respect of deaths on or after 1 January 1997 by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Schs 3, 4). As to the effect of this provision see PARA 584 note 7 ante.

2 *Re Taylor, Pullan v Taylor* [1931] 2 Ch 242. As to entailed interests see PARA 631 ante.

UPDATE

634 Minors dying without having married

TEXT AND NOTE 1--Administration of Estates Act 1925 s 51(3) further amended: Civil Partnership Act 2004 Sch 4 para 11.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(i) Application of Old Rules in respect of Deaths after 1926/635. Reference to Statutes of Distribution.

635. Reference to Statutes of Distribution.

In an instrument inter vivos made or in a will coming into operation after 1925, references to any Statutes of Distribution are to be construed as references to the rules of distribution enacted by the Administration of Estates Act 1925¹, and, in the case of an instrument inter vivos made or a will coming into operation after 1952, to the same rules as amended by the Intestates' Estates Act 1952², and references to statutory next of kin³, unless the context otherwise requires, as references to the persons who would take under those rules⁴. Trusts declared in an instrument inter vivos made or a will coming into operation before 1926 by reference to the Statutes of Distribution are, unless the contrary appears⁵, to be construed as referring to the enactments (other than the Intestates' Estates Act 1890⁶) in force relating to the distribution on an intestacy immediately before 1926⁷.

The presumption is that the rules to be applied are to be applied at the death of the deceased, and that the shares in which and trusts upon which the beneficiaries indicated by the rules are to take are those prescribed in the case of an intestacy⁸. The rules are to be applied in the same way in respect of all limitations in wills which the law may construe as limitations in favour of the next of kin according to the Statutes of Distribution⁹.

1 See PARAS 621-628 ante. This includes, in relation to an instrument inter vivos made or a will coming into operation after 1 January 1953, references to the Intestates' Estates Act 1952 Pt I (ss 1-6) (as amended), Schs 1, 2 (both as amended); and in relation to an instrument inter vivos made or a will or codicil coming into operation after 4 April 1988, references to the Family Law Reform Act 1987 s 18: Administration of Estates Act 1925 s 50(3); Intestates' Estates Act 1952 s 6(2); Family Law Reform Act 1987 s 18(3), (4).

2 See PARA 591 et seq ante.

3 A mere reference to 'next of kin' has been construed as an implied reference to the Statutes of Distribution: *Re Jackson, Holliday v Jackson* [1944] WN 26.

4 Administration of Estates Act 1925 s 50(1); Intestates' Estates Act 1952 s 6(2).

5 For instances where wills have been construed as showing no contrary intention see *Re Sutcliffe, Sutcliffe v Robertshaw* [1929] 1 Ch 123; *Re Sutton, Evans v Oliver* [1934] Ch 209; *Re Walsh, Public Trustee v Walsh* [1936] 1 All ER 327, CA.

6 As to the Intestates' Estates Act 1890 see PARA 638 post. It was held in *Re Morgan, Morgan v Morgan* [1920] 1 Ch 196 that the Intestates' Estates Act 1890 was not included in the phrase 'Statutes of Distribution' or

in the phrase 'statutes for the distribution of the personal estate of intestates'. As to the meaning of 'statute for the distribution of the estates of intestate persons' see *Re Hughes, Loddiges v Jones* [1916] 1 Ch 493.

7 Administration of Estates Act 1925 s 50(2). See PARA 637 post. See also *Re Sutcliffe, Sutcliffe v Robertshaw* [1929] 1 Ch 123; *Re Sutton, Evans v Oliver* [1934] Ch 209.

8 See eg *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v Chillingworth* [1952] Ch 30, [1951] 2 All ER 936, CA, and the cases there cited.

9 There are several such, eg a bequest of personalty to 'the heirs of A' or 'to A or his heirs'; 'the nearest relatives of A'. The question is one of construction: see WILLS vol 50 (2005 Reissue) PARA 513 et seq.

UPDATE

635 Reference to Statutes of Distribution

NOTE 1--Family Law Reform Act 1987 s 18(3) amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 25(3).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(ii) The Old Rules: Distribution of Personal Estate/636. Rules for distribution of personal estate.

(ii) The Old Rules: Distribution of Personal Estate

636. Rules for distribution of personal estate.

Although in theory it is still possible, it is in practice now highly improbable that the pre-1926 rules for distribution of personal estate will be needed at the present day. The rules for descent of real estate are marginally more likely to be relevant in the cases indicated previously¹ since title can in rare instances still depend on these.

The rules for distribution of personal estate are therefore only briefly summarised².

1 See PARAS 631-634 ante.

2 See PARA 637 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(ii) The Old Rules: Distribution of Personal Estate/637. The old rules.

637. The old rules.

After administration¹ the personal estate was distributed in the following order². First a surviving husband took his wife's whole estate³. Secondly, a widow took one-third of her husband's personal estate if he left issue and half if he left no issue⁴. If he died totally intestate after 1 September 1890 without issue the widow took absolutely all his real and personal estate up to a value of £500⁵. Thirdly, if there were no next of kin the widow took £500 and half the residue⁶.

Fourthly, subject to the rights of the surviving spouse as indicated previously, the children took in equal portions and if any children were then dead such persons as legally represented those children took⁷, being their descendants, and not their next of kin⁸. Descendants to the remotest degree stood in the place of their parent or other ancestor and took by their stocks the share which he or she would have taken⁹. The heir at law took equally with other children and accounted equally with them for advance of personalty but not for land or improvements of land inherited¹⁰. Subsequent entitlements were the father¹¹, the mother, brothers or sister, sharing equally¹², grandparents (if there were no brothers or sisters), nephews and nieces, and other relations ascertained in accordance with the civil law¹³. Subject to this the Crown took the personal estate as bona vacantia but any executors might take as against the Crown¹⁴.

1 As to administration see PARA 374 et seq ante. As to the distinction between administration and distribution see PARA 525 ante.

2 See the Statute of Distribution (1670) (repealed as respects deaths after 1925). The interests vested immediately on the death: *Cooper v Cooper* (1874) LR 7 HL 53.

3 However, property acquired by a wife after decree of judicial separation passed as if the husband had predeceased her: Matrimonial Causes Act 1857 s 25 (repealed and replaced by the Supreme Court of Judicature (Consolidation) Act 1925 s 194(1)(a) (repealed); see now the Matrimonial Causes Act 1973 s 18(2); and PARAS 162, 595 ante). As to commorientes before 1926 see PARA 147 ante.

4 Statute of Distribution (1670) s 3 (repealed as regards deaths after 1925).

5 Intestates' Estates Act 1890 ss 1, 2, 4 (repealed as regards deaths after 1925). These rights might be barred by a marriage settlement.

6 The other half went to the Crown. Separation or divorce had the same effect as under current law: see PARAS 595-596 ante. As to other bars see PARA 602 ante.

7 Children other than the heir at law had to bring into account any estates by settlement of the intestate and any advancements. A posthumous child was treated as if born in the father's lifetime: see PARA 604 ante.

8 *Bridge v Abbot* (1791) 3 Bro CC 224 at 226; *Evans v Charles* (1794) 1 Anst 128 at 132; *Price v Strange* (1820) 6 Madd 159.

9 *Re Ross' Trusts* (1871) LR 13 Eq 286; *Re Natt, Walker v Gammage* (1888) 37 ChD 517.

10 *Smith v Smith* (1801) 5 Ves 721.

11 Ie subject to the widow's rights if there were no descendants.

12 Children but not grandchildren of brothers or sisters could take their parents' share.

13 Quot personae tot gradus applied, by which the degrees of relationship were ascertained by counting up the number of generations to the common ancestor and then counting down the number of generations to the claimant. Relatives of a higher degree (ie separated by a smaller number of steps) took to the exclusion of those of a lower degree and relatives of the same degree took equally.

14 The Executors Act 1830 did not alter the position in this respect. As to bona vacantia see PARAS 613-614 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/638. Descent to the heir of real estate.

(iii) The Old Rules: Descent of Real Estate

638. Descent to the heir of real estate.

Real estate descended to the heir in accordance with the following rules which are still applicable in the cases mentioned previously¹ and may, in increasingly rare cases, still be of relevance in matters of title². The heir to freehold property was ascertained according to the following rules, which applied only in cases of death before 1926 and on or after 1 January 1834³. The descent of equitable estates was governed by the same rules as the descent of legal estates⁴. Dower and curtesy are discussed elsewhere in this work⁵.

1 See PARA 631 ante.

2 See PARA 636 ante.

3 This is the date on which the Inheritance Act 1833 came into force. The rules according to which the heir was ascertained before that date have still to be observed in cases where the death in question occurred before 1 January 1834, and, in so far as they differ from that Act, they are stated in the notes to this title. For the general supersession as regards deaths after 1925 of previously existing rules of descent by the Administration of Estates Act 1925 see s 45(1); and PARA 584 ante. For the preservation for certain purposes of the operation of the Inheritance Act 1833, amended by the Law of Property Amendment Act 1859 s 19, see PARAS 584 note 4, 632 note 1, 633 note 7 ante.

4 *Banks v Sutton* (1732) 2 P Wms 700 at 713; *Trash v Wood* (1839) 4 My & Cr 324.

5 See REAL PROPERTY vol 39(2) (Reissue) PARA 157 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESATE SUCCESSION/(4) DEATHS INTESATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/639. Rule 1: descent traced from the purchaser.

639. Rule 1: descent traced from the purchaser.

In every case descent was traced from the purchaser¹. The person who last acquired the land otherwise than by descent, or than by any escheat, partition or inclosure by the effect of which the land became part of or descendible in the same manner as other land acquired by descent, was the purchaser². The person last entitled to or who had a right to the land, whether he did or did not obtain the possession or receipt of its rents and profits, was considered to have been the purchaser of it, unless it was proved that he inherited it, and in like manner the last person from whom the land was proved to have been inherited was in every case considered to have been the purchaser unless it was proved that he inherited it³.

The intention of the Inheritance Act 1833 was only to lay down rules where there was any doubt⁴. Therefore, where a woman took as a coparcener by descent, and died intestate leaving a son, the whole of her share vested in the son, and it was not necessary to trace the descent as to that share from the purchaser from whom the coparcener derived her title⁵.

1 Inheritance Act 1833 s 2. Where there was a total failure of the purchaser's heirs, or where any land was descendible as if an ancestor had been its purchaser, and there was a total failure of the heirs of that ancestor, the land descended and the descent was then traced from the person last entitled to the land as if he had been its purchaser: Law of Property Amendment Act 1859 s 19.

2 Inheritance Act 1833 s 1. As to escheat see PARA 652 post.

3 Ibid ss 1, 2. The rule in cases where the death took place before 1834 was that inheritances lineally descend to the issue in infinitum of the person last actually seised, but never lineally ascend: 2 Bl Com (14th Edn) 208. As to what constituted actual seisin for the purpose of this rule see *R v Sutton* (1835) 5 Nev & MKB 353; *Goodtitle d Newman v Newman* (1774) 3 Wils 516; and Watkins' Law of Descents (4th Edn) 52.

4 *Cooper v France* (1850) 19 LJ Ch 313 at 314 per Shadwell V-C.

5 *Cooper v France* (1850) 19 LJ Ch 313; *Re Matson, James v Dickinson* [1897] 2 Ch 509. It is difficult to reconcile these decisions with the Inheritance Act 1833 s 2, but *Cooper v France* supra has never been questioned. As to coparceners see PARA 646 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/640. Limitation to heirs.

640. Limitation to heirs.

Where by an assurance land was limited to the grantor or to the heirs of the grantor, and, similarly, where by a will land was devised to the person who was in fact the testator's heir, the grantor or his heir, or the testator's heir (as the case might be), took as purchaser¹, and was deemed to be the purchaser for all purposes². This rule applied to a devise to or in trust for the testator's right heirs, or to any other form of words where the devise was in effect to the heir or to the person who should be the heir of the testator at the time of the testator's death, and was not confined to a devise to the testator's heir simply³. The quality of the estate taken was altered, so that where a man devised land to his own right heirs and left coheiresses, they took as joint tenants and not as coparceners or tenants in common⁴.

1 Inheritance Act 1833 s 3. This reversed the old rule under which the grantor or his heir or the testator's heir was considered to be entitled as of his former estate, or part of it: see *Pibus v Mitford* (1674) 1 Vent 372; *Chaplin v Leroux* (1816) 5 M & S 14; *Biederman v Seymour* (1841) 3 Beav 368.

2 *Strickland v Strickland* (1839) 10 Sim 374; *Owen v Gibbons* [1902] 1 Ch 636, CA.

3 *Owen v Gibbons* [1902] 1 Ch 636, CA.

4 *Owens v Gibbons* [1902] 1 Ch 636, CA. As to coparceners see PARA 646 post. As to tenancy in common see REAL PROPERTY vol 39(2) (Reissue) PARA 207 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/641. Devise to trustees.

641. Devise to trustees.

Where the descent was broken by a devise to trustees on trust to convey to the testator's heir, they were bound to convey to the heir according to the common law, that is, the heir of the paternal line, even if it came to the testator from the maternal line¹. A mere devise, however, to trustees for a purpose which failed (such as a devise on a trust for conversion which was void for remoteness) did not affect the quality of the interest undisposed of, so that the heir took the land in the character in which the testator had it, and if it came to the testator ex parte materna, his heir ex parte materna would take, and not his heir according to the common law².

This rule applied only to cases where the land was limited to the person or to the 'heirs' of the person conveying the land; it did not apply where there was a limitation to a person designate, even though such persona designata was in fact the heir³.

1 *Davis v Kirk* (1856) 2 K & J 391.

2 *Buchanan v Harrison* (1861) 1 John & H 662.

3 *Heywood v Heywood* (1865) 34 Beav 317.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/642. When descent was traced from an ancestor.

642. When descent was traced from an ancestor.

Where a person had become entitled to land under a limitation or devise to his ancestor's heirs, the land descended and the descent was traced as if the ancestor had been the purchaser¹.

1 Inheritance Act 1833 s 4. Eg if B, being the only child of A, settled land by a settlement in which the ultimate limitation was to A's right heirs and all the previous limitations failed, the descent was to be traced from A, and not from B. This was contrary to the former rule, under which such a grant or devise was treated as a restoration to the grantor or testator or part of his original estate, so that the line of descent was not broken: *Moore v Simkin* (1885) 31 ChD 95. The object of the Inheritance Act 1833 s 4 was only to provide how the land was to descend in case the purchaser did not dispose of it, not to alter the estate which he himself took. Accordingly, where land was limited to the right heirs of X (who took no interest in it), and his right heirs at the date of his death were three sisters and five daughters of a deceased sister, although for the purpose of ascertaining who were the personae designatae it was necessary to trace the descent from X, yet such persons did not take by descent from him, but under the direct gift to them, and therefore they took as joint tenants and not as coparceners: *Berens v Fellowes* (1887) 56 LT 391. As to coparceners see PARA 646 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/643. Failure of purchaser's heirs.

643. Failure of purchaser's heirs.

Where there was a total failure of heirs of the purchaser, or where any land was descendible as if an ancestor had been the purchaser of it, and there was a total failure of the heirs of that ancestor, the land descended and the descent was traced from the person last entitled as if he had been its purchaser¹.

1 Law of Property Amendment Act 1859 ss 19, 20. The Inheritance Act 1833 failed to provide for this case, with the result that in the case of deaths between 1 January 1834 and 13 August 1859, where there was a total failure of heirs of the purchaser, the heirs of the person last seised were not entitled to the land by descent, eg where an illegitimate person purchased land which descended to his son who died intestate and a bachelor, the persons claiming through the son's mother were not entitled to take as his heirs: *Doe d Blackburn v Blackburn* (1836) 1 Mood & R 547.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/644. Merger of equitable and legal estates.

644. Merger of equitable and legal estates.

The equitable estate merged in the legal estate if they united in the same person and were co-extensive and commensurate, and the legal estate then governed the descent. Therefore, if the intestate held the equitable estate as purchaser but the legal estate by descent, the descent was traced from the last purchaser of the legal estate¹.

1 *Brydges v Brydges, Philips v Brydges* (1796) 3 Ves 120; *Re Douglas, Wood v Douglas* (1884) 28 ChD 327.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/645. Rule 2: priority of males.

645. Rule 2: priority of males.

The descent on a death intestate before 1926 was in the first place to the issue of the purchaser lineally, the male issue being admitted before the female¹.

1 2 Bl Com (14th Edn) 212.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/646. Rule 3: coparceners.

646. Rule 3: coparceners.

The eldest only of two or more males of equal degree inherited, but females of equal degree all inherited together¹. Females or heirs of females who inherited together were called coparceners²; coparceners were said to be one heir to their ancestor³, but on the death of a coparcener intestate her share descended to her heirs⁴, and was subject to her husband's right of curtesy⁵. Even after a partition each coparcener continued entitled to her share by descent and not by purchase⁶.

1 2 Bl Com (14th Edn) 214.

2 Bac Abr, Coparceners; Littleton's Tenures ss 241, 254.

3 Littleton's Tenures s 24; Co Litt 163b.

4 Littleton's Tenures s 280; *Paterson v Mills* (1850) 19 LJ Ch 310; *Cooper v France* (1850) 19 LJ Ch 313; *Re Matson, James v Dickinson* [1897] 2 Ch 509.

- 5 Co Litt 174b. As to curtesy see REAL PROPERTY vol 39(2) (Reissue) PARA 157 et seq.
- 6 *Doe d Crosthwaite v Dixon* (1836) 5 Ad & El 834.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/647. Rule 4: lineal descendants.

647. Rule 4: lineal descendants.

On a death intestate before 1926 the lineal descendants in infinitum of any deceased person represented their ancestor¹; in other words they occupied the same position as he would have occupied if he had been alive².

- 1 2 Bl Com (14th Edn) 216.
- 2 Eg if A died having had an elder son, B, who predeceased his father, but leaving a son D, and a younger son C, who survived A, A's heir was his grandson D.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/648. Rule 5: lineal ancestors.

648. Rule 5: lineal ancestors.

On failure of lineal descendants or issue of the purchaser, the nearest lineal ancestor inherited¹. Accordingly a father was heir to his intestate son, in preference to the intestate's brother. This rule was, however, read as meaning that every lineal ancestor should be capable of being heir to any of his issue who were capable of inheriting from him. It did not do away with the rule that, in order to claim as heir, the claimant must be a son born in wedlock, and it was not sufficient that he should be legitimate in the country of his birth. Therefore, a son born in Scotland before wedlock, although legitimated by the subsequent marriage of his parents, could not take land in England as heir of his father, neither could his father inherit land from him under this rule².

- 1 Inheritance Act 1833 s 6. The rule in cases where the death took place before 1 January 1834 was that on failure of lineal descendants or issue of the person last seised the inheritance descended to the blood of the first purchaser (2 Bl Com (14th Edn) 220), which was based on the feudal rule that a fief could not ascend. This rule was subject to an apparent exception, called the doctrine of *possessio fratris*, under which the descent between brothers and sisters was immediate, so that in making out their title it was not necessary to name the common father, even if living (*Collingwood v Pace* (1664) 1 Vent 413), and although the father was in fact unable to hold the fief, eg by reason of being an alien; for, it was said, although the fief is not *antiquum*, still it descends '*ut antiquum*', and, the ancestor for this purpose being an assumed person, he must further be assumed to have been a capable ancestor (*Kynnaird v Leslie* (1866) LR 1 CP 389). However, the Inheritance Act 1833 s 5 provided that no brother or sister should be considered to inherit immediately from his or her brother or sister, but every such descent should be traced through the parent.
- 2 *Re Don's Estate* (1857) 4 Drew 194; cf *Doe d Birtwhistle v Vardill* (1835) 2 Cl & Fin 571, HL.

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649. Rule 6: priority of paternal line.

The paternal ancestor was preferred to the maternal ancestor. Accordingly no male maternal ancestor or any of his descendants was capable of inheriting until all the paternal ancestors and their descendants had failed; nor was any female paternal ancestor, or any of her descendants, until all the male paternal ancestors and their descendants had failed; nor was any female maternal ancestor, or any of her descendants, until all the male maternal ancestors and their descendants had failed¹.

Under this rule the descendants of the maternal ancestors had to be sought for, and taken as heirs when it had been shown after due inquiry that there was no reasonable probability of discovering descendants of a paternal ancestor. It was not necessary to show positively that there were no descendants of a male paternal ancestor². Where there was a failure of male paternal ancestors and their descendants, the mother of a more remote male paternal ancestor and her descendants were preferred to the mother of a less remote male paternal ancestor and her descendants; and where there was a failure of male maternal ancestors and their descendants, the mother of a more remote male maternal ancestor and her descendants were preferred to the mother of a less remote male maternal ancestor and her descendants³.

1 Inheritance Act 1833 s 7.

2 *Greaves v Greenwood* (1877) 2 Ex D 289, CA. As to the absence of any presumption of death without issue see CIVIL PROCEDURE vol 11 (2009) PARA 1102.

3 Inheritance Act 1833 s 8.

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650. Rule 7: half blood.

Any person related by the half blood was on a death intestate before 1926 capable of being the heir, and stood in the order of inheritance next after any relation in the same degree of the whole blood and his issue where the common ancestor was a male, and next after the common ancestor where the common ancestor was a female; so that the brother of the half blood on the part of the father inherited next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother inherited next after the mother¹.

1 Inheritance Act 1833 s 9. The rule in cases where the death took place before 1 January 1834 was that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood; kinsmen of the half blood could not inherit: 2 Bl Com (14th Edn) 224, 227.

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651. Qualified heir.

Where an owner of freeholds died intestate before 1926 leaving his wife pregnant, the qualified heir (the person who would be the heir if no child were subsequently born ranking before him in accordance with the rules of descent) was entitled to go into possession of the property and receive and retain the rents for his own benefit¹. Possibly this was not the case where the legal estate was outstanding in trustees².

¹ This applied both to rents actually received, and also to those accrued due before the birth of the posthumous child: *Richards v Richards* (1860) John 754; *Re Mowlem* (1874) LR 18 Eq 9; and see *Re Wilmer's Trusts*, *Moore v Wingfield* [1903] 1 Ch 874 at 888 per Buckley J.

In order to prevent the supplanting of the heir by a supposititious child of a deceased person, the heir presumptive was entitled to obtain, on petition (*Ex p Bellet* (1786) 1 Cox Eq Cas 297), a writ de ventre inspiciendo, to examine whether the widow claiming to be pregnant by the deceased husband was pregnant or not (Co Litt, 19th Edn by Hargrave (1832), 8b). This writ was addressed to the sheriff commanding him to impanel a jury of 12 knights and 12 matrons to examine the widow. If the jury found she was pregnant she could be detained in safe custody until after delivery, or the expiration of 40 weeks from the death of the husband (see *Willoughby's Case* (1597) Cro Eliz 566; *Theaker's Case* (1624) Cro Jac 686), but the practice in the more modern cases was to give a right of access to persons representing the petitioner, rather than to order the strict detention of the woman (*Ex p Aiscough* (1731) 2 P Wms 591; *Re Brown, ex p Wallop* (1792) 4 Bro CC 90, and the cases cited in the judgment). The grant was also extended to devisees: *Re Brown, ex p Wallop supra*.

² *Goodale v Gawthorne* (1854) 2 Sm & G 375, which was criticised, but not definitely dissented from, in *Richards v Richards* (1860) John 754.

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652. Escheat.

Where on an intestacy before 1926 there was no heir, real property was subject to a right of escheat. Escheat was the right whereby land of which there was no longer any tenant returned, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created¹. It was not strictly a reversion, as there could not and cannot be a reversion expectant upon an estate in fee simple, nor did the lord take the land by way of succession or inheritance as if from the tenant. The tenant's estate, subject to any charges upon it which he may have created, had come to an end, and the lord was in by his own right². Escheat was an incident of feudal tenure, and was based on the want of a tenant to perform the feudal services³.

¹ *A-G of Ontario v Mercer* (1883) 8 App Cas 767 at 772, PC, per Lord Selborne LC. 'Escheate is a term of art and derived from the French word escheate that is cadere, excidere or accidere and signifyeth properly when by accident the lands fall to the lord of whom they are holden': Co Litt 13a. See also Co Litt 92b; *Termes de la Ley* sv Escheate; Com Dig, Escheat (A 1); *May and Bannister v Street* (1588) Cro Eliz 120. As to escheat and its abolition see REAL PROPERTY vol 39(2) (Reissue) PARA 254.

2 *A-G of Ontario v Mercer* (1883) 8 App Cas 767 at 772, PC.

3 See *A-G v Sands* (1670) Hard 488; Tudor, LC Real Prop (4th Edn) 211; *Burgess v Wheate* (1759) 1 Eden 177 at 201 per Clarke MR.

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653. Land subject to escheat.

Land held in socage, whether of the Crown or a mesne lord, was always liable to escheat in the case of death intestate before 1926; but the interest which escheated could only be the whole fee¹. On the failure of issue under an estate tail, the land entailed did not escheat, but reverted to the owner of the reversion in fee expectant on the determination of the estate tail².

1 Before the passing of the Intestates' Estates Act 1884 things which did not lie in tenure were not subject to escheat. Accordingly a rentcharge did not escheat on the death of the owner intestate and without heirs, but ceased for the benefit of the owner of the land charged: *A-G v Sands* (1670) Hard 488 per Hale CB; Tudor, LC Real Prop (4th Edn) 211; and see *Dean and Canons of Windsor and Webb's Case* (1613) Godb 211. As to escheat see PARA 652 ante.

2 Com Dig, Escheat (A 1); Fitz Nat Brev 144.

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654. Escheat for want of a tenant.

Escheat propter defectum tenentis¹ occurred in the case of a death intestate before 1926 where the last owner died intestate as to the land and without any heir. In this event (which most commonly occurred where an illegitimate child² became possessed of lands as purchaser, and died intestate without issue) the lord or the Crown, as the case may be, re-entered in right of his or its former ownership, the estate which was granted having come to an end³.

1 Ie escheat for want of a tenant. There was also an escheat propter delictum tenentis (on account of the crime of the tenant) which practically became obsolete in 1870. Escheat for want of a tenant also occurred on the dissolution of a corporation or company: see REAL PROPERTY vol 39(2) (Reissue) PARA 254. As to escheat see PARA 652 ante.

2 Under the former law an illegitimate child is nullius filius (Co Litt 3b). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125.

3 *Burgess v Wheate* (1759) 1 Eden 177; 2 Co Inst 64.

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655. Intestates' Estates Act 1884.

Before the passing of the Intestates' Estates Act 1884¹, the legal owner of the estate was entitled to retain it for his own benefit notwithstanding that the equitable owner had died intestate and without heirs, for there could not be an escheat where the Crown or the lord had a tenant². In the case of the death intestate and without heirs on or after 14 August 1884 and before 1926 of a person entitled to any estate or interest, legal or equitable, in any corporeal hereditament, or to any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by that person's will, the law of escheat applied as if his estate or interest were a legal estate in corporeal hereditaments³; and where any beneficial interest in the real estate of any deceased person, whether legal or equitable, was, owing to the failure of the objects of the devise or other circumstances happening either before or after that person's death, in whole or in part not effectually disposed of, that person was deemed for the purposes of the Intestates' Estates Act 1884 to have died intestate in respect of such part of the said beneficial interest as was ineffectually disposed of⁴.

1 The Intestates' Estates Act 1884 is repealed as respects deaths after 1925.

2 This principle was applied to the case of a trustee of freeholds who had no beneficiary (*Burgess v Wheate* (1759) 1 Eden 177; *Cox v Parker* (1856) 22 Beav 168); a trustee of copyholds (*Taylor v Haygarth* (1844) 14 Sim 8); a trustee of shares in the New River Company (*Davall v New River Co* (1849) 3 De G & Sm 394); and a legal mortgagee (*Beale v Symonds* (1853) 16 Beav 406). An equitable mortgagee, or a mortgagee of a term, however, was not entitled to the estate on failure of the mortgagor's heirs. Subject to the mortgage debt the estate escheated to the Crown: *Rogers v Maule* (1841) 1 Y & C Ch Cas 4; *Prescott v Tyler* (1837) 1 Jur 470. The Crown was not entitled to call on a trustee to whom personalty had been bequeathed upon trust for conversion to convert it in order to raise a title in the Crown by way of escheat (*Walker v Denne* (1793) 2 Ves 170); nor was the Crown entitled to call upon a trustee to whom land had been devised on condition that he paid a certain sum to charity, the gift to the charity being void under the Statutes of Mortmain, to raise that sum and pay it to the Crown (*Henchman v A-G* (1834) 3 My & K 485). The equitable doctrine of notional conversion was, however, no bar to the Crown: *Talbot v Jevers* [1917] 2 Ch 363, CA. As to escheat see PARA 652 ante.

3 Intestates' Estates Act 1884 s 4 (repealed as respects deaths after 1925). For a more recent decision on the doctrine of escheat see *Re Lowe's Will Trusts, More v A-G* [1973] 2 All ER 1136, [1973] 1 WLR 882, CA.

4 Intestates' Estates Act 1884 s 7 (repealed as respects deaths after 1925). Sections 4 and 7 are to be read together, so that where a testatrix who left no heir devised a house to trustees in trust to sell and pay debts and legacies, and the will contained no gift of the residue of the proceeds of sale, it was held under s 7 that she had died intestate as regards the residue, and that under s 4 it escheated to the Crown: *Re Wood, A-G v Anderson* [1896] 2 Ch 596.

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656. To whom land escheated.

Escheat in the case of death intestate before 1926 was to the mesne lord if he could be found but, as since 1290 sub-infeudation has been forbidden¹, in the great majority of cases there was no record of the mesne tenure, and the escheat was to the Crown as the lord paramount of the whole soil of the country, or to the Duchy of Lancaster in cases within the Duchy². Copyhold

land could not escheat to the Crown unless the Crown was lord of the manor of which the copyholds were held³.

As the Land Transfer Act 1897⁴ did not bind the Crown, it would appear that escheated real estate vested in the Crown and not in the legal personal representative, so that where the Treasury Solicitor applied for a grant to him, as the representative of the Crown, of administration of the estate of a person who had died without issue illegitimate and intestate, the proper form was to grant letters of administration of the personal estate only⁵.

The Crown's right to an escheat could be barred by adverse possession⁶ or first registration with absolute title⁷.

1 18 Edw 1 (Quia Emptores) (1289) c 1; *Re Holliday* [1922] 2 Ch 698. As to escheat see PARA 652 ante.

2 *Dyke v Walford* (1848) 5 Moo PCC 434; *Megit v Johnson* (1780) 2 Doug KB 542 at 548 per Lord Mansfield CJ. As to the Duchy of Lancaster see the Intestates' Estates Act 1884 s 8 (repealed as regards deaths after 1925); and CROWN PROPERTY vol 12(1) (Reissue) PARA 300 et seq. As to escheat in the Duchy of Cornwall, cf *Re Canning, Solicitor to the Duchy of Cornwall v Canning* (1880) 5 PD 114.

3 *Walker v Denne* (1793) 2 Ves 170. As to land formerly copyhold see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 642; REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq. See also PARA 662 post.

4 For provisions as to the devolution of real estate see the Land Transfer Act 1897 s 1 (repealed as respects deaths after 1925). The first registration of any person as proprietor of freehold land with an absolute title had the effect, under the Land Transfer Act 1875 s 7 (repealed), of barring any claim to the land already accrued to the Crown by way of escheat. Escheat subsequent to such first registration was preserved by s 105 (repealed): *Re Suarez (No 2)* [1924] 2 Ch 19. As to the effect of registration on the Crown's right to bona vacantia under the modern law see PARA 614 ante.

5 *Re Hartley* [1899] P 40. Where, on the other hand, a creditor of the intestate applied for administration, the grant was made 'in respect of all the estate of the deceased, which by law devolves to and vests in the legal personal representative' leaving the question open: *Re Ball* (1902) 47 Sol Jo 129.

6 *Tuthill v Rogers* (1844) 6 I Eq R 429. As to adverse possession see LIMITATION PERIODS vol 68 (2008) PARA 1016 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 258.

7 *Re Suarez (No 2)* [1924] 2 Ch 19; Land Transfer Act 1875 s 7 (repealed). Escheat subsequent to such first registration was preserved by s 105 (repealed).

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657. Regrant of escheated land.

Property which had escheated to the Crown on a death intestate before 1926 might in certain cases be granted to the family of, or to persons adopted as part of the family of, the person whose estate it had been, or to the person discovering the escheat¹, and on application being duly made this might be done by way of waiver of the Crown's rights²; but, subject as above, the Crown could not grant any real estate alleged to be escheated until after an inquisition finding the title to it had been returned to the Central Office of the Supreme Court³. Such inquisition should have found of whom the estate was held, and if it did not so find, any person aggrieved was entitled to obtain from the High Court an order for the taking of another inquisition⁴, but no inquisition could prejudice any rights which at the time of the death leading to the inquisition were vested in some other person⁵.

1 Crown Private Estate Act 1800; Crown Lands Act 1819; Intestates' Estates Act 1884 s 6 (repealed as regards deaths after 1925); and cf *Moggridge v Thackwell* (1803) 7 Ves 36 at 71; *Mason v A-G of Jamaica* (1843) 4 Moo PCC 228.

2 Intestates' Estates Act 1884 s 6 (repealed as regards deaths after 1925).

3 Escheat (Procedure) Act 1887 s 2(3).

4 Ibid s 2(5).

5 Ibid s 2(4). For the rules made under this Act see the Escheat Procedure Rules 1889, SR & O Rev 1903, IV p 1, and the Escheat Procedure (Duchy of Lancaster) Rules 1910, SR & O 1913, p 235. As to the inquisition of escheat see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 265.

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658. Escheat to mesne lord.

The rights of a mesne lord taking by escheat before 1926 were similar to those of the Crown¹, but some act of the lord was necessary to perfect his title; the actual possession of the land could not be gained until he entered or brought his action to recover the land². His right to escheat for want of a tenant³ was after 29 August 1833⁴ subject to the payment of the debts of his tenant, even though those debts were not charged by the tenant on his land⁵. The Intestates' Estates Act 1884⁶ appears to have been as much in favour of the mesne lord, if any, as of the Crown⁷.

1 See PARA 652 et seq ante.

2 3 Cru Dig (4th Edn) 398.

3 See PARA 654 ante.

4 See the Administration of Estates Act 1833 (repealed as respects deaths after 1925).

5 *Evans v Brown* (1842) 5 Beav 114; *Hughes v Wells* (1852) 9 Hare 749.

6 See PARA 655 note 1 ante.

7 See PARA 655 ante. The commonest case of escheat to a mesne lord arose in the case of copyholds. As to land formerly copyhold see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 642; REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq. See also PARA 662 post.

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659. Estate tail.

An estate tail before 1926 was such an estate as was limited to a succession of owners in a descending line only¹, and on a failure of such owners reverted to the grantor, unless barred. On the death of an owner of an estate tail the heirs in tail were entitled per formam doni².

1 As to entailed interests after 1925 see PARA 631 ante; and as to the devolution of the legal estate in settled land since that date see PARA 367 ante.

2 13 Edw 1 (Statute of Westminster the Second) (1285) c 1. The language of the Land Transfer Act 1897 s 1(1) (repealed as respects deaths after 1925) was wide enough to include these estates, but it seems that s 1(1) did not in fact include such estates.

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660. Descent of estate tail.

Within the limits marked out by the original grant, the descent of an estate tail on a death before 1926 was the same, and the rules for ascertaining the heir were the same as those of an estate in fee simple¹; but the limitation of the grant to the heirs of the donee's body rendered it impossible that any of those rules subsequent to rule 4² should apply; and if the estate was limited in tail male or in tail female, rules 2 and 3³ were so far unnecessary. In cases, however, where there was a special custom of descent, that custom was to be taken into account in ascertaining the heir in tail; accordingly an estate tail in gavelkind land descended to all the donee's sons in equal shares, while borough english land granted to a man and the heirs of his body descended to his youngest son (or youngest brother by special custom)⁴, and copyhold land granted to a man and the heirs of his body descended to his heir according to the custom of the manor⁵.

On the failure of issue under an estate tail the land did not escheat, but reverted to the owner of the reversion in fee expectant on the determination of the estate tail⁶.

1 See PARA 638 et seq ante.

2 See PARA 647 ante.

3 See PARAS 645-646 ante.

4 As to gavelkind see PARA 663 post; and as to borough english see PARA 664 post.

5 Copyhold land was only entailable by custom: *Doe d Wightwick v Truby* (1774) 2 Wm Bl 944 at 946. Where there was no custom to entail, a grant of copyhold in words which, in the case of freehold would create an estate tail, created a fee simple conditional on birth of issue: *Doe d Spencer v Clark* (1822) 5 B & Ald 458; *Doe d Blesard v Simpson* (1842) 3 Man & G 929, Ex Ch; *Hardcastle v Dennison* (1861) 10 CBNS 606. As to land formerly copyhold see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 642; REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq. See also PARA 662 post.

6 Com Dig, Escheat (A 1); Fitz Nat Brev 144.

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661. Customary land.

Customary land of all kinds¹ descended on a death before 1926 to the heir according to the custom, but, subject to the custom, the rules for ascertaining the heir already set out² applied to customary land as if it was freehold³.

An equitable estate, where the trust was executed (for example in the case of an equity of redemption or of a resulting trust) descended in the same way as if the estate were legal⁴, except in the cases where the customary descent was only applicable to the case of 'a tenant dying seised'⁵. An executory interest, however, descended to the heir according to the common law⁶.

The descent of customary land was not broken unless the owner conveyed away all his interest and, on another transaction and by another conveyance, took back the estate as a new estate, and so as to take it by purchase. It was not sufficient to convey it to a trustee for the owner⁷. Customary freehold ceased to exist as such on 1 January 1926, and is now subject to the same rules as ordinary freehold⁸.

1 'Customary land' includes customary freehold, gavelkind land, borough english land and copyholds: see PARAS 662-664 post.

2 See PARA 637 et seq ante.

3 In the Inheritance Act 1833 s 1, 'land' includes manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold, copyhold (see PARA 662 post), or of any other tenure, and whether descendible according to the common law or according to the custom of gavelkind (see PARA 663 post) or borough english (see PARA 664 post), or any other custom. See also *Brown's Case* (1581) 4 Co Rep 21a at 22a; *Hook v Hook* (1862) 1 Hem & M 43.

4 *Blunt v Clark* (1658) 2 Sid 61; *Roberts v Dixwell* (1738) 1 Atk 607; *Starkey v Starkey* (1746) 8 Bac Abr 302; *Fawcett v Lowther* (1751) 2 Ves Sen 300; *Re Hudson, Cassels v Hudson* [1908] 1 Ch 655.

5 Elton on Copyholds (2nd Edn) 139; *Payne v Barker* (1662) O Bridg 18; *Rider v Wood* (1855) 1 K & J 644 at 657. In *Trash v Wood* (1839) 4 My & Cr 324, the custom as proved was that on the death of a tenant seised of copyhold it should go to the younger son, but it was held that, despite the word 'seised', the customary heir in tail was entitled to land vested in a trustee in trust for the intestate and his heirs in tail, 'for it is not to be expected that the court rolls should furnish evidence of a custom immediately applicable to trust estates, because all the transactions recorded in the court rolls are of transfers of the legal estate': *Trash v Wood* supra at 329 per Lord Cottenham LC.

6 *Payne v Barker* (1662) O Bridg 18; *Mallinson v Siddle* (1870) 18 WR 569; *Trash v Wood* (1839) 4 My & Cr 324; *Re Hudson, Cassels v Hudson* [1908] 1 Ch 655.

7 *Nanson v Barnes* (1869) LR 7 Eq 250.

8 See REAL PROPERTY vol 39(2) (Reissue) PARA 36. See also the Administration of Estates Act 1925 s 45(1)(a).

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662. Copyholds.

Copyholds¹ descended according to the custom of the manor of which they were held². In deciding questions as to the custom of a manor, the court would not depart from the literal meaning of the words of the custom as proved, or supply other words in their place, and in cases to which the custom as proved did not extend, the land descended to the heir at common law³. Copyholds were compulsorily enfranchised on 1 January 1926, and former copyholds are now subject to the same rules as freeholds⁴.

1 Copyhold land was land held by copy of court roll, held at the will of the lord according to the custom of the manor. As to the nature of manors and manorial customs see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 641 et seq. As to copyhold see REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

2 As to customs of the manor see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 641 et seq

3 *Denn v Spray* (1786) 1 Term Rep 466; *Muggleton v Barnett* (1857) 2 H & N 653, Ex Ch. Where the custom was for the land to descend to the youngest son or daughter, brother or sister, uncle or aunt, and a tenant died leaving none of these but sons of a deceased uncle, it was held that the heir at common law was entitled to the land, and not the youngest son of the youngest uncle: *Re Smart, Smart v Smart* (1881) 18 ChD 165.

4 See REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

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663. Descent of gavelkind land.

In Kent gavelkind¹ was, before 1926, the common law and a matter of judicial knowledge which did not need to be proved by evidence². The descent was among all the sons or their representatives; where one brother died without issue, all his brothers inherited³, but if a brother died leaving issue, such issue stood in their father's place per stirpes⁴.

In default of sons and their issue, land subject to the custom of gavelkind descended to daughters⁵. The partibility among heirs of the same degree extended to all degrees of remoteness⁶. Females took after males of the same degree; but jure representationis they might inherit together with males⁷.

It seems that under a devise to the right heirs of the testator or of a stranger the heir at common law and not the gavelkind heirs took the devised estate⁸. This form of descent has been abolished with regard to the estate of any person dying after 1925⁹.

1 As to the custom of gavelkind generally see REAL PROPERTY vol 39(2) (Reissue) PARA 14.

2 *Re Chenoweth, Ward v Dwelley* [1902] 2 Ch 488. 'In the county of Kent, where lands and tenements are holden in gavelkind, there by the custom and use the issues male ought equally to inherit': Littleton's Tenures s 210.

3 *Re Chenoweth, Ward v Dwelley* [1902] 2 Ch 488.

4 Co Litt 140a; *Crump d Woolley v Norwood* (1815) 7 Taunt 362.

5 Statute Prerogativa Regis (temp incert) c 18 (repealed).

6 *Re Chenoweth, Ward v Dwelley* [1902] 2 Ch 488; *Hook v Hook* (1862) 1 Hem & M 43.

7 *Clements v Scudamore* (1703) 1 P Wms 63.

8 *Thorp v Owen* (1854) 2 Sm & G 90; *Garland v Beverley* (1878) 9 ChD 213; and cf *Polley v Polley (No 2)* (1862) 31 Beav 363 (borough english); and Co Litt 10a. But see contra *Sladen v Sladen* (1862) 2 John & H 369 at 373 per Page Wood V-C; and *Hawes v Hawes* (1880) 14 ChD 614 (limitation in a deed). As to borough english see PARA 664 post.

9 Administration of Estates Act 1925 s 45(1)(a). See also *Re Price* [1928] Ch 579. As to the statutory exceptions in cases of incapacity see PARAS 633-634 ante. Apparently the descent must be traced to the heir at law of the last purchaser and not to the gavelkind heir on a death after 1925 (*Re Price* supra); see also PARA 584 note 4 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/7. INTESTATE SUCCESSION/(4) DEATHS INTTESTATE BEFORE 1926/(iii) The Old Rules: Descent of Real Estate/664. Descent of borough english land.

664. Descent of borough english land.

Land which was subject to the custom of borough english¹ descended to the youngest son of the deceased owner². By special custom land might descend to the youngest brother, the youngest daughter or sister, or the youngest in any other degree³. The daughter of a youngest son (who had died in the lifetime of his father) took jure representationis in preference to the next younger son who had survived the father⁴.

A devise of borough english land to the heir or heirs of a deceased person might be read as a devise to the heir or heirs at common law, who took as personae designatae, and not to the borough english heir or heirs⁵. A younger son who took land by the custom of borough english was nevertheless entitled to his full share of the intestate's personalty⁶.

The custom of borough english was abolished with regard to the estate of any person dying after 1925⁷.

1 As to the custom of borough english generally see REAL PROPERTY vol 39(2) (Reissue) PARA 15.

2 Littleton's Tenures s 165: 'For some boroughs have such a custome that if a man have issue many sonnes and dyeth the youngest son shall inherit all the tenements which were his father's within the same borough as heire unto his father by force of the custome: the which is called borough english'.

3 1 Roll Abr 624, pl 2; *Bayly v Stevens* (1607) Cro Jac 198; *Reve v Malster and Barrow* (1635) Cro Car 410; *Rapley and Chaplein's Case* (1610) Godb 166; *Denn v Spray* (1786) 1 Term Rep 466; *Re Smart, Smart v Smart* (1881) 18 ChD 165; cf *Muggleton v Barnett* (1857) 2 H & N 653 Ex Ch.

4 *Clements v Scudamore* (1703) 1 P Wms 63.

5 *Polley v Polley (No 2)* (1862) 31 Beav 363. See also PARA 663 note 8 ante.

6 *Lutwyche v Lutwyche* (1735) Cas temp Talb 276.

7 Administration of Estates Act 1925 s 45(1)(a). As to the statutory exceptions in cases of incapacity see PARAS 633-634 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(1) INTRODUCTION/665. Restrictions on testamentary disposition.

8. FAMILY PROVISION

(1) INTRODUCTION

665. Restrictions on testamentary disposition.

The complete freedom of testamentary disposition which was a characteristic of English law sometimes resulted in a testator disregarding his family obligations and making insufficient provision or no provision for his wife and children. This is prevented in systems of law which are founded on the Roman Civil Law by setting aside for the widow and children definite shares of the estate. The duty of providing maintenance for them is imposed by statute in some Commonwealth jurisdictions. The principle of restriction on freedom of testamentary disposition is reflected in English law by the Inheritance (Provision for Family and Dependents) Act 1975¹. The Inheritance (Provision for Family and Dependents) Act 1975, which governs applications for provision out of the estates of persons dying on or after 1 April 1976², repealed and replaced the Inheritance (Family Provision) Act 1938 and applies whether the deceased made a will or died intestate³.

1 See the Inheritance (Provision for Family and Dependents) Act 1975 as amended by the Administration of Justice Act 1982 s 52; the Matrimonial and Family Proceedings Act 1984 ss 8, 25; the Law Reform (Succession) Act 1995 s 2; and prospectively amended by the Family Law Act 1996 s 66(1), Sch 8.

2 See the Inheritance (Provision for Family and Dependents) Act 1975 s 26(3). The Inheritance (Provision for Family and Dependents) Act 1975 repealed earlier legislation which, although preserved for deaths before 1 April 1976, is in practice, because of the six-month limit on applications (see PARA 697 post), defunct, but could still operate where probate has been very much delayed.

3 See *ibid* s 1(1). The jurisdiction under the Inheritance (Family Provision) Act 1938 could only be exercised where the deceased left a will: see *Re Bidie, Bidie v General Accident Fire and Life Assurance Corp Ltd* [1949] Ch 121, [1948] 2 All ER 995, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(1) INTRODUCTION/666. Application for financial provision from the deceased's estate.

666. Application for financial provision from the deceased's estate.

Where after 1 April 1976¹ a person dies domiciled² in England and Wales³, and is survived by any of certain persons⁴, that person may apply⁵ to the court⁶ for an order under the Inheritance (Provision for Family and Dependents) Act 1975⁷ on the ground that the disposition of the deceased's estate effected by his will⁸ or the law relating to intestacy⁹, or the combination of his will and that law, is not such as to make reasonable financial provision¹⁰ for the applicant¹¹.

Applications under the Inheritance (Provision for Family and Dependents) Act 1975 are not precluded by the forfeiture rule¹².

1 Inheritance (Provision for Family and Dependents) Act 1975 ss 1(1), 27(3).

2 Domicile is distinct from residence: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq. The domicile must be proved by the applicant (*Mastaka v Midland Bank Executor and Trustee Co Ltd* [1941] Ch 192, [1941] 1 All ER 236), although it is normally stated in the probate.

3 The Inheritance (Provision for Family and Dependents) Act 1975 does not extend to Scotland or Northern Ireland: s 27(2). In Northern Ireland the Inheritance (Provision for Family and Dependents) (Northern Ireland)

Order 1979, SI 1979/924, applies to deaths of individuals domiciled in Northern Ireland on or after 1 September 1979 and is in large part identical to the Inheritance (Provision for Family and Dependents) Act 1975.

4 le those persons specified in *ibid* s 1(1): see PARA 667 post.

5 As to the mode of application see PARA 699 post.

6 'The court', unless the context otherwise requires, means the High Court or where a county court has jurisdiction by virtue of the Inheritance (Provision for Family and Dependents) Act 1975 s 22 (repealed), a county court: s 25(1) (definition amended by the Matrimonial and Family Proceedings Act 1984 s 8(2)). See also PARA 699 post. A county court now has jurisdiction to hear and determine any application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 post) (including any application for permission to apply for such an order and any application made, in the proceedings on an application for such an order, for an order under any other provision of that Act): County Courts Act 1984 s 25 (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule). See COURTS.

7 le under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 post): see s 1(1).

8 'Will' includes codicil: *ibid* s 25(1).

9 As to the law relating to intestacy see PARA 583 et seq ante.

10 As to the meaning of reasonable financial provision see PARA 668 et seq post.

11 Inheritance (Provision for Family and Dependents) Act 1975 s 1(1).

12 See the Forfeiture Act 1982 s 3(2)(a); and WILLS vol 50 (2005 Reissue) PARAS 341-342. An application brought before that Act came into force by a widow convicted of her husband's manslaughter, as sole beneficiary under his will, failed: *Re Royse, Royse v Royse* [1985] Ch 22, [1984] 3 All ER 339, CA; cf *Re K* [1985] Ch 85, [1985] 1 All ER 403; *Re S* [1996] 1 WLR 235, [1996] 1 FLR 910.

UPDATE

666 Application for financial provision from the deceased's estate

TEXT AND NOTES 1-11--Inheritance (Provision for Family and Dependents) Act 1975 s 1 amended: Civil Partnership Act 2004 Sch 4 para 15.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(1) INTRODUCTION/667. Persons for whom provision may be made.

667. Persons for whom provision may be made.

The Inheritance (Provision for Family and Dependents) Act 1975 enables the court¹ to make an order for a wide variety of relief² out of a breadth of property in favour of the following persons³:

- (1) the wife or husband of the deceased⁴;
- (2) a former wife or former husband of the deceased who has not remarried⁵;
- (3) a person other than the husband or wife or former husband or former wife of the deceased who, if the deceased died on or after 1 January 1996, was living in the same household as the deceased as the husband or wife of the deceased during the whole of the period of two years ending immediately before the date when the deceased died⁶;
- (4) a child⁷ of the deceased⁸;

(5) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage⁹; and

(6) any person, not falling within any other class of applicant, who immediately before the death¹⁰ of the deceased was being maintained, either wholly or partly¹¹, by the deceased¹².

1 For the meaning of 'court' see PARA 666 note 6 ante.

2 As to the orders which the court may make see the Inheritance (Provision for Family and Dependents) Act 1975 s 2; and PARA 691 post.

3 See *ibid* s 1(1); and PARA 666 ante. As to the guidelines applicable on the application of particular applicants see PARAS 677-678 post. Claims under the Inheritance (Provision for Family and Dependents) Act 1975 are personal and do not survive the death of the applicant: *Whytfe v Ticehurst* [1986] Fam 64, [1986] 2 All ER 158; *Re Bramwell* [1988] 2 FLR 263. Where an applicant died after the date of the order but before an appeal could be heard the court allowed her estate to retain a lump sum award: *Smith v Smith (Smith intervening)* [1992] Fam 69, [1991] 2 All ER 306, CA. See also *Barder v Caluori* [1988] AC 20, sub nom *Barder v Barder (Caluori intervening)* [1987] 2 All ER 440, HL.

4 Inheritance (Provision for Family and Dependents) Act 1975 s 1(1)(a). Any reference to a wife or husband is to be treated as including a reference to a person who, in good faith entered into a void marriage with the deceased unless either: (1) the marriage of the deceased and that person was dissolved or annulled during the lifetime of the deceased and the dissolution or annulment is recognised by the law of England and Wales; or (2) that person has during the lifetime of the deceased entered into a later marriage: s 25(4). 'Wife' also includes the wife of a polygamous marriage: *Re Sehota, Surjit Kaur v Gian Kaur* [1978] 3 All ER 385, [1978] 1 WLR 1506. As to the matters which the court must take into account in considering an application by the wife or husband of the deceased see PARAS 669, 671-677 post.

5 Inheritance (Provision for Family and Dependents) Act 1975 s 1(1)(b). 'Former wife' or 'former husband' means a person whose marriage with the deceased was during the lifetime of the deceased either: (1) dissolved or annulled by a decree of divorce or a decree of nullity of marriage granted under the law of any part of the British Islands; or (2) dissolved or annulled in any country or territory outside the British Islands by a divorce or annulment which is entitled to be recognised as valid by the law of England and Wales: s 25(1) (substituted by the Matrimonial and Family Proceedings Act 1984 s 25(2)). Any reference to remarriage or to a person who has remarried includes a reference to a marriage which is by law void or voidable or to a person who has entered into such a marriage, as the case may be, and a marriage is treated as a remarriage, in relation to any party, notwithstanding that the previous marriage of that party was void or voidable: Inheritance (Provision for Family and Dependents) Act 1975 s 25(5). It is doubtful whether a former spouse who survives the deceased but remarries before an application for financial provision is made is a person qualified to claim: see *Re Collins* [1990] Fam 56, [1990] 2 All ER 47.

Where an order is made on the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or under the Matrimonial and Family Proceedings Act 1984 s 17, the court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage is not, on the death of the applicant entitled to apply for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 post) and in such a case the court will not subsequently entertain any application for an order under s 2: see ss 15, 15A (s 15 amended by and s 15A added by the Matrimonial and Family Proceedings Act 1984 ss 8, 25). For these purposes, 'the court' means the High Court or a county court, where a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-44) (as amended): see the Inheritance (Provision for Family and Dependents) Act 1975 ss 15 (as so amended), 15A (as so added). In the case of a decree of divorce or nullity of marriage, an order may be made before or after the decree is made absolute, but if it is made before the decree is made absolute it does not take effect unless the decree is made absolute: s 15(2).

As to the matters which the court must take into account in considering an application by a former wife or former husband of the deceased who has not remarried see PARAS 669-671, 678 post.

6 *Ibid* s 1(1)(ba), (1A) (added by the Law Reform (Succession) Act 1995 s 2(1)-(3)). As to the matters which the court must take into account in considering an application by such a cohabitee, see PARAS 670-671, 679 post. As to the meaning of 'immediately before' see note 10 *infra*. The test as to whether a person was living in the same household as the deceased as the husband or wife of the deceased is objective and should not ignore the multifarious nature of marital relationships: *Re Watson* [1999] 1 FLR 878 per Neuberger J. A homosexual couple may constitute a 'family' but cannot live together as husband and wife: *Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705, HL.

7 'Child' includes an illegitimate child and a child en ventre sa mere at the death of the deceased: Inheritance (Provision for Family and Dependants) Act 1975 s 25(1). An adopted child is a child for the purposes of the Inheritance (Provision for Family and Dependants) Act 1975: see the Adoption Act 1976 s 39(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 376. A person who is born a 'child of the deceased' loses his right to claim if he is subsequently adopted before an application for financial provision is made: *Re Collins* [1990] Fam 56, [1990] 2 All ER 47.

8 Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(c). As to the matters which the court must take into account in considering an application by a child of the deceased see PARAS 670-671, 680 post.

9 Ibid s 1(1)(d). An adult can be a person 'treated by the deceased as a child of the family': *Re Callaghan* [1985] Fam 1, [1984] 3 All ER 790; *Re Leach, Leach v Lindeman* [1986] Ch 226, [1985] 2 All ER 754, CA. A grandchild may be such a person: *Re A (child of the family)* [1998] 1 FLR 347, CA. As to the matters which the court must take into account in considering an application by a person treated by the deceased as a child of the family see PARAS 670-671, 680 post.

10 In determining whether a person was maintained 'immediately before' the death of the deceased the court is required to look, not at the de facto state of maintenance existing at the moment of death, but at the settled and enduring basis or arrangement existing at the moment of death: *Re Beaumont, Martin v Midland Bank Trust Co Ltd* [1980] Ch 444, [1980] 1 All ER 266 (a short stay in hospital prior to death is not sufficient to prevent a claim). See also *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29, CA. Where the applicant and the deceased had separated on what was likely to be a permanent basis only days before the deceased's death, after ten years of cohabitation, the deceased had abandoned his assumption of responsibility for the applicant and the claim failed: *Kourkgy v Lusher* (1983) 4 FLR 65, 12 Fam Law 86. See also *Layton v Martin* [1986] 2 FLR 227 (the claim could not be pursued where the separation occurred two years before death).

11 A person is treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the needs of that person: Inheritance (Provision for Family and Dependants) Act 1975 s 1(3). 'Valuable consideration' does not include marriage or a promise of marriage: s 25(1)

It is necessarily only to prove maintenance, an applicant need not prove that the deceased assumed responsibility for his or her maintenance as well: *Re B* [2000] 1 All ER 665, CA. Cf *Re Beaumont, Martin v Midland Bank Trust Co Ltd* [1980] Ch 444, [1980] 1 All ER 266; *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29, CA. The assumption of responsibility is relevant in considering the merits of an application but this can usually be presumed once actual maintenance is established: *Jelley v Iliffe* supra at 137 and 35 per Stephenson LJ.

Assistance with light household duties is not 'full valuable consideration' (*Re Wilkinson, Neale v Newell* [1978] Fam 22, [1978] 1 All ER 221) but the phrase is not limited to situations where a contractual relationship exists (*Re Beaumont, Martin v Midland Bank Trust Co Ltd* supra). If the flow of benefits from the applicant to the deceased is broadly commensurate with the contribution made by the deceased to the applicant, full valuable consideration will be demonstrated, but a caring and devoted applicant is not to be put in a worse position than an uncaring applicant: *Bishop v Plumley* [1991] 1 All ER 236 at 241-242, [1991] 1 WLR 582 at 587-588, CA, per Butler-Sloss LJ. The existence of a tenancy agreement does not preclude an applicant from making an application under the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(e) if there was a close friendship within which the deceased wished to make a substantial contribution towards the applicant's maintenance: *Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041.

12 Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(e). As to the matters which the court must take into account in considering an application by a dependant of the deceased, see PARAS 670-671, 681 post. The purpose of s 1(1)(e) is to remedy an injustice of a person being put by the deceased in a position of dependency and then deprived of financial support after the deceased's death: *Re Beaumont, Martin v Midland Bank Trust Co Ltd* [1980] Ch 444, [1980] 1 All ER 266; *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29, CA; *Bishop v Plumley* [1991] 1 All ER 236, [1991] 1 WLR 582, CA. Successful applications have been made by a sister (*Re Wilkinson, Neale v Newell* [1978] Fam 22, [1978] 1 All ER 221); a mistress (*Malone v Harrison* [1979] 1 WLR 1353); a common law husband (*Jelley v Iliffe* supra; *Graham v Murphy* [1997] 1 FLR 860, [1997] 2 FCR 441); a common law wife (*Harrington v Gill* (1983) 4 FLR 265, CA; *Bishop v Plumley* [1991] 1 All ER 236, [1991] 1 WLR 582, CA); a friend paying less than the market rent for premises owned by the deceased (*Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041); and a mother who looked after her severely brain-damaged daughter until death (*Re B* [2000] 1 All ER 665, CA). Homosexual applicants may fall into this category: *Wayling v Jones* [1995] 2 FLR 1029, CA (where the claim actually succeeded under the doctrine of proprietary estoppel). For a case in which the application failed see eg *Re Beaumont, Martin v Midland Bank Trust Co Ltd* supra. Many of the decisions under the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(e) would, in the case of deaths after 1995, be decided under s 1(1)(ba) (as added): see the text and note 6 supra.

The burden of proof rests with the applicant, who must prove that he is a person who was being maintained before the court can consider whether reasonable financial provision has been made: *Re Wilkinson, Neale v Newell* supra.

UPDATE**667 Persons for whom provision may be made**

TEXT AND NOTES 1-5--In heads (1) and (2) references to wife or husband are now to spouse or civil partner and reference to remarriage is to remarriage or forming a subsequent civil partnership: Inheritance (Provision for Family and Dependents) Act 1975 s 1(a), (b) (substituted by Civil Partnership Act 2004 Sch 4 para 15).

NOTES 4, 5--1975 Act s 25(4) amended: 2004 Act Sch 4 para 27(4). See *Gandhi v Patel* [2002] 1 FLR 603 (Hindu marriage ceremony not recognised under English law).

NOTE 5--1975 Act s 25(1) amended, s 25(5) substituted: 2004 Act Sch 4 para 27(2), (5).

See also 1975 Act s 15ZA (added by 2004 Act Sch 4 para 21) (restriction imposed in proceedings for dissolution etc of a civil partnership on application under 1975 Act); and s 15B (added by 2004 Act Sch 4 para 22) (restriction imposed in proceedings under 2004 Act Sch 7 on application under 1975 Act).

NOTES 6, 10-12--See *Lindop v Agus* [2009] EWHC 1795 (Ch), [2009] WTLR 1175 (retaining different address not inconsistent with claimant living in household as wife of deceased).

NOTE 6--See *Baker v Baker* [2008] EWHC 937 (Ch), [2008] 3 FCR 547.

NOTE 10--See *Re Dix* [2004] EWCA Civ 139, [2004] 1 WLR 1399 (claimant still living in same household even though living separately at moment of death).

NOTE 12--See *Witkowska v Kaminski* [2006] EWHC 1940 (Ch), [2006] 3 FCR 250 (no requirement that ability to claim depended on claimant being legal resident in United Kingdom); *Baynes v Hedger* [2009] EWCA Civ 374, [2009] 2 FCR 183 (no responsibility had been assumed by the testatrix).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(2) REASONABLE FINANCIAL PROVISION/668. The test of reasonable financial provision.

(2) REASONABLE FINANCIAL PROVISION**668. The test of reasonable financial provision.**

The test of reasonable financial provision is whether the disposition of the deceased's estate effected by his will¹ or the law relating to intestacy², or the combination of his will and that law, is not such as to make reasonable financial provision³ for the applicant⁴. The language is wholly impersonal and the test is objective⁵. The question is not whether the deceased stands convicted of unreasonableness, but whether the provision in fact made is unreasonable⁶.

In exercising its jurisdiction the court is required to follow the statutory directions as to the matters to be considered⁷. The question is answered as at the date of investigation by the court and not as at the date of death⁸, and in considering the statutory matters to which the court is required to have regard, the court must take into account the facts as known to it at the date of the hearing⁹.

The deceased's reasons for not making any provision for the applicant are relevant but no special significance should be attached to them¹⁰.

1 For the meaning of 'will' see PARA 666 note 8 ante.

2 As to the law relating to intestacy see PARA 583 et seq ante.

3 For the meaning of 'reasonable financial provision' see the Inheritance (Provision for Family and Dependents) Act 1975 s 1(2); and PARAS 669-670 post.

4 Ibid s 1(1). As to the persons for whom provision may be made see PARAS 667 ante, 677-681 post.

5 *Re Coventry, Coventry v Coventry* [1980] Ch 461 at 474, [1979] 2 All ER 408 at 418, CA, per Oliver J and at 488-489 and 823 per Goff LJ; *Moody v Stevenson* [1992] Ch 486, [1992] 1 FLR 494, CA; *Jessop v Jessop* [1992] 1 FLR 591, CA; *Re Jennings* [1994] Ch 286, [1994] 3 All ER 27, CA; *Re Hancock* [1998] 2 FLR 346, CA; *Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041; *Espinosa v Bourke* [1999] 1 FLR 747, CA. See also *Re Franks, Franks v Franks* [1948] Ch 62, [1947] 2 All ER 638; *Re Goodwin, Goodwin v Goodwin* [1969] 1 Ch 283, [1968] 3 All ER 12; *Re Gregory, Gregory v Goodenough* [1971] 1 All ER 497 at 502, [1970] 1 WLR 1455 at 1461, CA; *Re Shanahan, De Winter (formerly Shanahan) v Legal Personal Representatives of Shanahan* [1973] Fam 1, [1971] 3 All ER 873.

6 *Re Goodwin, Goodwin v Goodwin* [1969] 1 Ch 283 at 287, [1968] 3 All ER 12 at 15 per Megarry J, approved in *Re Gregory, Gregory v Goodenough* [1971] 1 All ER 497 at 502, [1970] 1 WLR 1455 at 1461, CA, per Winn LJ; *Re Shanahan, De Winter (formerly Shanahan) v Legal Personal Representatives of Shanahan* [1973] Fam 1, [1971] 3 All ER 873; *Millward v Shenton* [1972] 2 All ER 1025, [1972] 1 WLR 711, CA.

7 In the matters stated in the Inheritance (Provision for Family and Dependents) Act 1975 s 3 (as amended): see PARAS 671-681 post.

8 A lengthy delay between the death and the application or hearing can result in applicants being awarded provision when they would not have succeeded had the application been heard earlier: *Re Hancock* [1998] 2 FLR 346, CA (where sale of land to a supermarket chain resulted in a six-fold increase in the value of the estate between the grant of probate and the hearing); *Stock v Brown* [1994] 1 FLR 840 (where the application was made because interest rates fell some six years after the grant of probate and an extension of time was granted (see PARAS 697-698 post)). See also *Re Shanahan, De Winter (formerly Shanahan) v Legal Personal Representatives of Shanahan* [1973] Fam 1 at 8, [1971] 3 All ER 873 at 880 per Lord Simon of Glaisdale; *Re Goodwin, Goodwin v Goodwin* [1969] 1 Ch 283 at 289, [1968] 3 All ER 12 at 16 per Megarry J.

9 Inheritance (Provision for Family and Dependents) Act 1975 s 3(5).

10 Evidence of the deceased's reasons, though hearsay, is admissible: see the Civil Evidence Act 1995 s 1; and CIVIL PROCEDURE vol 11 (2009) PARA 806 et seq. As to the significance to be attached to the deceased's reasons see *Williams v Johns* [1988] 2 FLR 475; and see *Re Pugh, Pugh v Pugh* [1943] Ch 387, [1943] 2 All ER 361; *Re Searle, Searle v Siems* [1949] Ch 73, [1948] 2 All ER 426; *Re Smallwood, Smallwood v Martins Bank Ltd* [1951] Ch 369, [1951] 1 All ER 372.

UPDATE

668 The test of reasonable financial provision

TEXT AND NOTES 3, 4--Inheritance (Provision for Family and Dependents) Act 1975 s 1 amended: Civil Partnership Act 2004 Sch 4 para 15.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(2) REASONABLE FINANCIAL PROVISION/669. Meaning of reasonable financial provision in the case of an application by the spouse.

669. Meaning of reasonable financial provision in the case of an application by the spouse.

In the case of an application¹ made by the husband or wife² of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance³.

1 Is an application for an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 post) made by virtue of the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(a) (see PARA 666 ante); see s 1(2)(a).

2 As to the meanings of 'husband' and 'wife' see PARA 667 note 4 ante. See also PARAS 667 ante, 677 post.

3 Inheritance (Provision for Family and Dependants) Act 1975 ss 1(2)(a), 25(1). What is reasonable depends upon the facts of each case but on an application by a surviving spouse reasonable financial provision is unqualified by what would be reasonable by way of maintenance: see eg *Re Besterman*, *Besterman v Grusin* [1984] Ch 458, [1984] 2 All ER 656, CA; *Re Bunning*, *Bunning v Salmon* [1984] Ch 480, [1984] 3 All ER 1. The court does not in all cases make an order for very broad provision in favour of a surviving spouse but sometimes limits provision to all that is required by way of maintenance: *Re Gregory*, *Gregory v Goodenough* [1971] 1 All ER 497, [1970] 1 WLR 1455; *Re Rowlands* [1984] FLR 813; *Re Krubert* [1997] Ch 97, [1996] 3 WLR 959, CA. As to the meaning of 'maintenance' see PARA 670 post.

UPDATE

669 Meaning of reasonable financial provision in the case of an application by the spouse

TEXT AND NOTES--Inheritance (Provision for Family and Dependants) Act 1975 s 1(2) amended: Civil Partnership Act 2004 Sch 4 para 15(6).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(2) REASONABLE FINANCIAL PROVISION/670. Meaning of reasonable financial provision in the case of other applicants.

670. Meaning of reasonable financial provision in the case of other applicants.

In the case of an application¹ made by any applicant other than the surviving husband or wife² of the deceased, reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance³.

There is, for these purposes, no statutory definition of maintenance and the courts have been reluctant to introduce a definition⁴. Maintenance is not limited to the bare necessities of life but is not so broad as to cover anything which may be regarded as desirable for an applicant's benefit or welfare⁵ but connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him but provision need not be by way of income payments if a lump sum is more appropriate⁶.

1 le an application for an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 post) made by virtue of s 1(1)(b)-(e) (s 1(1)(ba) as added) (see PARA 666 ante): see s 1(2)(b). See also PARAS 667 ante, 678-681 post.

2 As to the meanings of 'husband' and 'wife' see PARA 667 note 4 ante.

3 Inheritance (Provision for Family and Dependants) Act 1975 ss 1(2)(b), 25(1).

4 *Re Dennis, Dennis v Lloyds Bank Ltd* [1981] 2 All ER 140 at 145, 124 Sol Jo 885 per Browne-Wilkinson J.

5 *Re Coventry, Coventry v Coventry* [1980] Ch 461 at 485, [1979] 3 All ER 815 at 819-820, CA, per Goff LJ. See also *Re E, E v E* [1966] 2 All ER 44 at 48, [1966] 1 WLR 709 at 715 per Stamp J (reasonable provision is not limited to keeping a dependant above the bread line); *Millward v Shenton* [1972] 2 All ER 1025 at 1028, [1972] 1 WLR 711 at 715, CA, per Lord Denning MR; *Re Christie, Christie v Keeble* [1979] Ch 168 at 174, [1979] 1 All ER 546 at 550 per Vivian Price QC (reasonable provision refers to no more and no less than the applicant's way of life and well-being, his health, financial security and allied matters such as the well-being, health and financial security of his immediate family for whom he is responsible) (criticised in *Re Coventry, Coventry v Coventry* supra). See further *Re Catmull, Catmull v Watts* [1943] Ch 262, [1943] 2 All ER 115; *Re Borthwick, Borthwick v Beauvais* [1949] Ch 395, [1949] 1 All ER 472; *Malone v Harrison* [1979] 1 WLR 1353, 123 Sol Jo 804; *Re Dennis, Dennis v Lloyds Bank Ltd* [1981] 2 All ER 140, 124 Sol Jo 885; *Re Jennings* [1994] Ch 286, [1994] 3 All ER 27, CA; *Re Abram* [1996] 2 FLR 379; *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63, [1997] 1 WLR 1216, CA; *Re Pearce* [1998] 2 FLR 705, CA.

6 *Re Dennis, Dennis v Lloyds Bank Ltd* [1981] 2 All ER 140 at 145, 124 Sol Jo 885 per Browne-Wilkinson J; approved in *Re Jennings* [1994] Ch 286 at 297, [1994] 3 All ER 27 at 35 per Nourse LJ; and in *Espinosa v Bourke* [1999] 1 FLR 747 at 758, CA, per Butler-Sloss LJ. For examples of the kinds of awards made see PARAS 678-681 post.

UPDATE

670 Meaning of reasonable financial provision in the case of other applicants

TEXT AND NOTES 1-3--Inheritance (Provision for Family and Dependants) Act 1975 s 1(2) amended: Civil Partnership Act 2004 Sch 4 para 15(6).

NOTE 5--See also *Garland v Morris* [2007] EWHC 2 (Ch), [2007] 2 FLR 528; *Negus v Bahouse* [2007] EWHC 2628 (Ch), [2008] 1 FLR 381; and *Webster v Webster* [2008] EWHC 31 (Ch), [2009] 1 FLR 1240.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT/(i) Guidelines applicable to all Cases/671. The common statutory guidelines.

(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT

(i) Guidelines applicable to all Cases

671. The common statutory guidelines.

Where an application is made for an order under the Inheritance (Provision for Family and Dependants) Act 1975¹, the court² must, in determining whether the disposition of the deceased's estate effected by his will³ or the law relating to intestacy⁴, or the combination of his will and that law, is such as to make reasonable financial provision⁵ for the applicant; and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it is to exercise its powers to make such an order, the court must have

regard to a number of factors⁶, including the financial resources and financial needs of the applicant or applicants and the beneficiaries⁷, the obligations and responsibilities of the deceased⁸, the size and nature of the estate⁹, the existence of any physical or mental disability¹⁰ and the conduct of any party¹¹. In the case of particular applicants further specific considerations apply¹².

1 le an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 post): see s 3(1).

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 For the meaning of 'will' see PARA 666 note 8 ante.

4 As to the law relating to intestacy see PARA 583 et seq ante.

5 For the meaning of 'reasonable financial provision' see PARAS 669-670 ante. As to the test of reasonable financial provision see PARA 668 ante.

6 Inheritance (Provision for Family and Dependents) Act 1975 s 3(1).

7 See *ibid* s 3(1)(a)-(c); and PARA 672 post.

8 See *ibid* s 3(1)(d); and PARA 673 post.

9 See *ibid* s 3(1)(e); and PARA 674 post.

10 See *ibid* s 3(1)(f); and PARA 675 post.

11 See *ibid* s 3(1)(g); and PARA 676 post.

12 See PARAS 677-681 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT/(i) Guidelines applicable to all Cases/672. Financial resources and financial needs.

672. Financial resources and financial needs.

In making its determination¹ the court² is required to have regard to:

- (1) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future³;
- (2) the financial resources and financial needs which any other applicant for an order⁴ has or is likely to have in the foreseeable future⁵; and
- (3) the financial resources and financial needs which any beneficiary⁶ of the estate of the deceased has or is likely to have in the foreseeable future⁷.

In considering any person's financial resources for these purposes the court must take into account his earning capacity⁸. The availability of state benefits is also relevant⁹. In considering any person's financial needs the court must take into account his financial obligations and responsibilities¹⁰ and have regard to his needs for the foreseeable future¹¹. In considering the financial resources for the foreseeable future the court should take account of the potential earning capacity of an applicant or beneficiary¹².

1 le in determining whether the disposition of the deceased's estate is such as to make reasonable financial provision for the applicant and, if reasonable financial provision has not been made, whether and in what manner the court is to exercise its powers to make an order: see the Inheritance (Provision for Family and Dependents) Act 1975 s 3(1); and PARA 671 ante. For the meaning of 'reasonable financial provision' see PARAS 669-670 ante. As to the test of reasonable financial provision see PARA 668 ante.

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 Inheritance (Provision for Family and Dependents) Act 1975 s 3(1)(a).

4 le an order under *ibid* s 2 (see PARAS 691-692 post): see s 3(1)(b).

5 *Ibid* s 3(1)(b).

6 'Beneficiary', in relation to the estate of a deceased person, means: (1) a person who under the will of the deceased or under the law relating to intestacy (see PARA 583 et seq ante) is beneficially interested in the estate or would be so interested if an order had not been made under the Inheritance (Provision for Family and Dependents) Act 1975; and (2) a person who has received any sum of money or other property which by virtue of s 8(1) or s 8(2) (see PARAS 683-684 post) is treated as part of the net estate of the deceased or would have received that sum or other property if an order had not been made under the Act: s 25(1). As to the net estate see PARA 682 post.

7 *Ibid* s 3(1)(c).

8 *Ibid* s 3(6).

9 See *Re Watkins, Hayward v Chatterton* [1949] 1 All ER 695, where Roxburgh J took the view that the testator was entitled to distribute his estate on the footing that his dependant daughter who was a patient in a mental hospital, could and should take advantage of the provisions of the social security legislation; and in *Re Elliott* (1956) Times, 18 May, where Danckwerts J (dissenting from the view expressed by *Re Catmull, Catmull v Watts* [1943] Ch 262 at 268, [1943] 2 All ER 115 at 117 per Uthwatt J) took the view that a testator was not free to dispose of his property elsewhere and make no provision for his widow, merely because she would receive a widow's pension from the state; *Re E, E v E* [1966] 2 All ER 44, [1966] 1 WLR 709 (the availability of state benefits is particularly relevant in the case of small estates). See also *Re Collins* [1990] Fam 56, [1990] 2 All ER 47.

10 Inheritance (Provision for Family and Dependents) Act 1975 s 3(6).

11 See *Re Ducksbury, Ducksbury v Ducksbury* [1966] 2 All ER 374, [1966] 1 WLR 1226; *Re Clayton, Clayton v Howell* [1966] 2 All ER 370, [1966] 1 WLR 969. In general the reference to 'needs' is to reasonable requirements (*Harrington v Gill* (1983) 4 FLR 265, CA) but in the case of a surviving spouse the standard of living to which the applicant has become accustomed is relevant: *Re Besterman, Besterman v Grusin* [1984] Ch 458, [1984] 2 All ER 656, CA.

12 See *Re Ducksbury, Ducksbury v Ducksbury* [1966] 2 All ER 374, [1966] 1 WLR 1226; *Re Bunning, Bunning v Salmon* [1984] Ch 480, [1984] 3 All ER 1 (applicant likely to take part-time employment); *Re Pearson-Gregory* (1957) Times, 11 October (provision made for the applicant under an inter vivos trust); *Jessop v Jessop* [1992] 1 FLR 591, CA (receipt of a pension); *Re Crawford* (1983) 4 FLR 273; *Re Catmull, Catmull v Watts* [1943] Ch 262, [1943] 2 All ER 115; *Re Charman, Charman v Williams* [1951] WN 599, [1951] 2 TLR 1095; *Re Clayton, Clayton v Howell* [1966] 2 All ER 370, [1966] 1 WLR 969; *Re Fullard, Fullard v King* [1982] Fam 42, [1981] 2 All ER 796, CA (provision of a lump sum on divorce or as a result of an insurance policy or other death benefit).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT/(i) Guidelines applicable to all Cases/673. Obligations and responsibilities of the deceased.

673. Obligations and responsibilities of the deceased.

In making its determination¹ the court² is required to have regard to any obligations and responsibilities which the deceased had towards any applicant for an order³ or towards any beneficiary⁴ of the estate of the deceased⁵.

As a general rule only those obligations and responsibilities undischarged immediately before death should be considered⁶. In relation to both applicants and beneficiaries, the court considers not only legal obligations and responsibilities but also those which can more loosely be described as moral claims⁷, but once an applicant has established that he is a person entitled to apply, in no case is there an invariable prerequisite that a moral obligation or some other special circumstance must be shown⁸. The source of the deceased's estate is a relevant consideration in determining what the obligations and responsibilities of the deceased were and what emphasis should be placed on them⁹.

1 In determining whether the disposition of the deceased's estate is such as to make reasonable financial provision for the applicant and, if reasonable financial provision has not been made, whether and in what manner the court is to exercise its powers to make an order: see the Inheritance (Provision for Family and Dependents) Act 1975 s 3(1); and PARA 671 ante. For the meaning of 'reasonable financial provision' see PARAS 669-670 ante. As to the test of reasonable financial provision see PARA 668 ante.

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 In an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 post): see s 3(1)(d).

4 For the meaning of 'beneficiary' see PARA 672 note 6 ante.

5 Inheritance (Provision for Family and Dependents) Act 1975 s 3(1)(d). For examples of the application of this provision see *Re Joslin, Joslin v Murch* [1941] Ch 200, [1941] 1 All ER 302 (provision made by testator out of very small estate for illegitimate children and their mother, and no provision made for lawful wife: no interference by court); *Re Simson, Simson v National Provincial Bank Ltd* [1950] Ch 38, [1949] 2 All ER 826 (housekeeper beneficiary); *Re Brown, Brown v Knowles* (1955) 105 L Jo 169 (promise made to children of first marriage by testator raising a moral obligation did not oust the court's jurisdiction to entertain application by second wife); *Re Bellman* [1963] P 239, [1963] 1 All ER 513; *Re Ducksbury, Ducksbury v Ducksbury* [1966] 2 All ER 374, [1966] 1 WLR 1226 (conflict between obligations to daughter and second wife); *Sivyer v Sivyer* [1967] 3 All ER 429, [1967] 1 WLR 1482 (conflict between obligations to child and third wife); *Re Fullard, Fullard v King* [1982] Fam 42, [1981] 2 All ER 796, CA (no obligation to former wife); *Re Besterman, Besterman v Grusin* [1984] Ch 458, [1984] 2 All ER 656, CA (obligation to wife stronger than to charity as principal beneficiary); *Re Debenham* [1986] 1 FLR 404 (obligation to 58 year old epileptic daughter); *Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041 (deceased's 'obligation' to provide friend with low rent tenancy); *Espinosa v Bourke* [1999] 1 FLR 747, CA (promise by deceased to adult daughter outweighed relevance of her misbehaviour); *Re Watson* [1999] 1 FLR 878 (applicant cohabitee has stronger claim than Crown taking estate bona vacantia).

6 *Re Jennings* [1994] Ch 286, [1994] 3 All ER 27, CA. An application brought by a person who has already been adequately provided for by the deceased will fail if the obligation has been discharged: *Rhodes v Dean* (28 March 1996) Lexis, Enggen Library, Cases File, CA (applicant took £36,000 contents of joint bank account by survivorship). See also *Re Talbot, Talbot v Talbot* [1962] 3 All ER 174, [1962] 1 WLR 1113; *Roberts v Roberts* [1964] 3 All ER 503, [1965] 1 WLR 560; *Jessop v Jessop* [1992] 1 FLR 591, CA.

7 *Re Coventry, Coventry v Coventry* [1980] Ch 461, [1979] 3 All ER 815, CA; *Re Jennings* [1994] Ch 286, [1994] 3 All ER 27, CA; *Re Hancock* [1998] 2 FLR 346, CA; *Re Pearce* [1998] 2 FLR 705, CA; *Espinosa v Bourke* [1999] 1 FLR 747, CA; *Re Watson* [1999] 1 FLR 878.

8 *Re Pearce* [1998] 2 FLR 705 at 710, CA, per Nourse LJ; *Re Hancock* [1998] 2 FLR 346, CA; *Espinosa v Bourke* [1999] 1 FLR 747 at 755, CA, per Butler-Sloss LJ; *Re Watson* [1999] 1 FLR 878; cf *Re Coventry, Coventry v Coventry* [1980] Ch 461, [1979] 3 All ER 815, CA; *Re Jennings* [1994] Ch 286, [1994] 3 All ER 27, CA. For examples of the application of a requirement of moral obligation in the case of an adult child see also *Re Coventry, Coventry v Coventry* supra and *Re Jennings* supra; these should be treated with care following *Re Hancock* supra, *Re Pearce* supra and *Espinosa v Bourke* supra.

9 *Re Styler, Styler v Griffith* [1942] Ch 387, [1942] 2 All ER 201; *Re Brownbridge, Brownbridge v Brownbridge* (1942) 193 LT Jo 185; *Sivyer v Sivyer* [1967] 3 All ER 429, [1967] 1 WLR 1482; *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29, CA; *Re Callaghan* [1985] Fam 1, [1984] 3 All ER 790; *Re Leach, Leach v Lindeman* [1986] Ch 226, [1985] 2 All ER 754, CA; *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63, [1997] 1 WLR 1216, CA. That an applicant or beneficiary has assisted the deceased in building up a business is a relevant consideration: *Re Brownbridge, Brownbridge v Brownbridge* supra; *Thornley v Palmer* [1969] 3 All ER 31, [1969] 1 WLR 1037; *Re Rowlands* [1984] FLR 813; *Re Abram* [1996] 2 FLR 379.

UPDATE

673 Obligations and responsibilities of the deceased

NOTE 7--See *Challinor v Challinor* [2009] EWHC 180 (Ch), [2009] WTLR 931 (reluctance of defendant to provide further indicated it would not be sufficient to rely on moral obligation and Court ought to order provision from the estate).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT/(i) Guidelines applicable to all Cases/674. The size and nature of the estate.

674. The size and nature of the estate.

In making its determination¹ the court² is required to have regard to the size and nature³ of the deceased's net estate⁴. Where the estate is large, reasonable financial provision will be judged accordingly and it will not be so important to balance the rights of the applicant against the beneficiaries⁵ but a large estate does not of itself justify an award as provision must be reasonable⁶. Applications and appeals in small estates are discouraged by the courts⁷ but there is no absolute rule that applications made in small estates must fail⁸.

1 In determining whether the disposition of the deceased's estate is such as to make reasonable financial provision for the applicant and, if reasonable financial provision has not been made, whether and in what manner the court is to exercise its powers to make an order: see the Inheritance (Provision for Family and Dependents) Act 1975 s 3(1); and PARA 671 ante. For the meaning of 'reasonable financial provision' see PARAS 669-670 ante. As to the test of reasonable financial provision see PARA 668 ante.

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 Where the principal asset of the estate is a property in which the beneficiaries live or from which they make their living the court will have regard to the consequences of ordering provision which results in a premature realisation of that asset but there is no absolute bar to depriving a beneficiary of his home or the like: *Re Brownbridge, Brownbridge v Brownbridge* (1942) 193 LT Jo 185; *Re E, E v E* [1966] 2 All ER 44, [1966] 1 WLR 709; *Thornley v Palmer* [1969] 3 All ER 31, [1969] 1 WLR 1037; *Re Rowlands* (1984) 5 FLR 813; *Re Farrow* [1987] 1 FLR 205. The origin of the deceased's estate is a relevant factor: see the cases cited in PARA 673 note 9 ante.

4 Inheritance (Provision for Family and Dependents) Act 1975 s 3(1)(e). As to the net estate see PARA 682 post.

5 *Malone v Harrison* [1979] 1 WLR 1353; *Re Inns, Inns v Wallace* [1947] Ch 576, [1947] 2 All ER 308 (applicants only entitled to maintenance should not have awards increased because of size of estate); *Re Borthwick, Borthwick v Beauvais* [1949] Ch 395, [1949] 1 All ER 472 (substantial estate, small provision made by testator for wife, who during the testator's life had been kept in penury: provision increased); *Re Black* (1953) Times, 25 March (large estate: provision for son increased); *Re Besterman, Besterman v Grusin* [1984] Ch 458, [1984] 2 All ER 656, CA.

6 *Re Coventry, Coventry v Coventry* [1980] Ch 461, [1979] 3 All ER 815, CA; *Re Dennis, Dennis v Lloyds Bank Ltd* [1981] 2 All ER 140, 124 Sol Jo 885; *Cameron v Treasury Solicitor* [1996] 2 FLR 716, [1996] Fam Law 723, CA.

7 *Re Coventry, Coventry v Coventry* [1980] Ch 461, [1979] 3 All ER 815, CA; *Re Clayton, Clayton v Howell* [1966] 2 All ER 370, [1966] 1 WLR 969. The courts regularly order costs against the claimant in such cases: *Re Vrint, Vrint v Swain* [1940] Ch 920, [1940] 3 All ER 470; *Re E, E v E* [1966] 2 All ER 44, [1966] 1 WLR 709; *Re Fullard, Fullard v King* [1982] Fam 42, [1981] 2 All ER 796, CA; *Brill v Proud* [1984] Fam Law 59, CA.

8 The smallness of the estate neither excludes jurisdiction nor full consideration: *Re Clayton, Clayton v Howell* [1966] 2 All ER 370 at 371, [1966] 1 WLR 969 at 971 per Ungood-Thomas J. See also eg *Re Vrint, Vrint v*

Swain [1940] Ch 920, [1940] 3 All ER 470 (estate too small to provide maintenance); *Re Clayton, Clayton v Howell* supra (£400 lump sum awarded in place of maintenance from £1,271 estate); *Re Gregory, Gregory v Goodenough* [1971] 1 All ER 497, [1970] 1 WLR 1455, CA (small estate; court slow to deprive testator of his right to dispose of it in his own way); *Re E, E v E* [1966] 2 All ER 44, [1966] 1 WLR 709 (estate too small to provide for deserted wife); and see *Re Joslin, Joslin v Murch* [1941] Ch 200, [1941] 1 All ER 302; *Re Catmull, Catmull v Watts* [1943] Ch 262, [1943] 2 All ER 115; *Re Parry* (1956) Times, 19 April; *Re Parkinson* (1975) Times, 4 October, CA. The availability of state benefits is important in cases where the estate is small: see PARA 672 text and note 9 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT/(i) Guidelines applicable to all Cases/675. Physical or mental disability.

675. Physical or mental disability.

In making its determination¹ the court² is required to have regard to any physical or mental disability of any applicant for an order³ or any beneficiary⁴ of the deceased's estate⁵. The presence of a physical or mental disability does not of itself give rise to or defeat a claim but may affect the obligations or responsibilities which the deceased had towards an applicant or beneficiary⁶. Physical or mental disability may also affect needs and earning capacity⁷, and the availability of state aid is often relevant⁸.

1 Ie in determining whether the disposition of the deceased's estate is such as to make reasonable financial provision for the applicant and, if reasonable financial provision has not been made, whether and in what manner the court is to exercise its powers to make an order: see the Inheritance (Provision for Family and Dependents) Act 1975 s 3(1); and PARA 671 ante. For the meaning of 'reasonable financial provision' see PARAS 669-670 ante. As to the test of reasonable financial provision see PARA 668 ante.

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 Ie an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 post): see s 3(1)(f).

4 For the meaning of 'beneficiary' see PARA 672 note 6 ante.

5 Inheritance (Provision for Family and Dependents) Act 1975 s 3(1)(f).

6 See PARA 673 ante.

7 *Re Clayton, Clayton v Howell* [1966] 2 All ER 370, [1966] 1 WLR 969 (applicant crippled in both legs); *Millward v Shenton* [1972] 2 All ER 1025, [1972] 1 WLR 711, CA (adult child with progressive illness and limited earning capacity); *Re Debenham* [1986] 1 FLR 404; *Re Watson* [1999] 1 FLR 878 (two storey house inappropriate for cohabitee applicant with mobility problems). See also PARA 672 ante.

8 *Re Watkins, Hayward v Chatterton* [1949] 1 All ER 695, [1949] WN 125 (only limited provision necessary where place available in state mental hospital); *Re Wood, Wood v Wood* [1982] LS Gaz R 774 (provision of capital appropriate even where state aid would be reduced as a result); and see *Re E, E v E* [1966] 2 All ER 44, [1966] 1 WLR 709. See also PARA 672 text and note 9 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT/(i) Guidelines applicable to all Cases/676. Conduct and other matters.

676. Conduct and other matters.

In making its determination¹ the court² is required to have regard to any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant³. This broad guideline refers principally to the conduct of any person (including the deceased⁴) as well as the applicant⁵ whether before or after the death⁶. Conduct can be positive as well as negative⁷. The deceased's reasons for not making any provision may be relevant⁸.

1 In determining whether the disposition of the deceased's estate is such as to make reasonable financial provision for the applicant and, if reasonable financial provision has not been made, whether and in what manner the court is to exercise its powers to make an order: see the Inheritance (Provision for Family and Dependants) Act 1975 s 3(1); and PARA 671 ante. For the meaning of 'reasonable financial provision' see PARAS 669-670 ante. As to the test of reasonable financial provision see PARA 668 ante.

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 Inheritance (Provision for Family and Dependants) Act 1975 s 3(1)(g).

4 *Re Borthwick, Borthwick v Beauvais* [1949] Ch 395, [1949] 1 All ER 472 (wife kept in penury by deceased); *Thornley v Palmer* [1969] 3 All ER 31, [1969] 1 WLR 1037 (deceased manic-depressive and violent drunk); *Re W* (1975) 119 Sol Jo 439 (deceased had concealed his financial provision from wife during divorce proceedings).

5 *Mastaka v Midland Bank Executor and Trustee Co Ltd* [1941] Ch 192, [1941] 1 All ER 236 (testatrix's daughter had treated the relationship of mother and daughter as non-existent, and no order was made); *Re Andrews, Andrews v Smorfit* [1955] 3 All ER 248, [1955] 1 WLR 1105 (estranged daughter left home to set up with a man whom she never married); *Re Morris* [1967] CLY 4114 (applicant wife who had no intention of assisting in the home); *Re Harker-Thomas* [1969] P 28, [1968] 3 All ER 17, CA (wife concealed her financial position in order to continue to receive maintenance at a higher level than she would have been entitled); *Re Fullard, Fullard v King* [1982] Fam 42, [1981] 2 All ER 796, CA (applicant and deceased were divorced); *Re Snoek* (1983) 13 Fam Law 18 (wife awarded only £5,000 out of estate of £20,000 because of her atrocious and vicious behaviour); *Williams v Johns* [1988] 2 FLR 475 (applicant caused shame and distress to the deceased); *Espinosa v Bourke* [1999] 1 FLR 747, CA (daughter left deceased to be cared for by grandson and cleaner).

6 *Re Hancock* [1998] 2 FLR 346, CA (delay is a factor which may be taken into account).

7 *Malone v Harrison* [1979] 1 WLR 1353 (conduct of mistress reflected positively).

8 As to the relevance of the deceased's reasons see PARA 668 text and note 10 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(3) MATTERS WHICH THE COURT MUST TAKE INTO ACCOUNT/(ii) Guidelines applicable to Particular Applicants/677. The wife or husband of the deceased.

(ii) Guidelines applicable to Particular Applicants

677. The wife or husband of the deceased.

On an application for an order¹ by the deceased's wife or husband², in addition to the common statutory guidelines³, the court⁴ must also have regard to⁵: (1) the applicant's age⁶ and the duration of the marriage⁷; and (2) the contribution made by the applicant to the welfare of the deceased's family, including any contribution made by looking after the home or caring for the family⁸. Unless at the date of death a decree of judicial separation was in force and the separation was continuing, the court must also have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce⁹.

1 le under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARA 691 post): see s 3(2).

2 le made by virtue of ibid s 1(1)(a) (see PARA 667 ante): see s 3(2). As to the meanings of 'wife' and 'husband' see PARA 667 note 4 ante.

3 le ibid s 3(1) (see PARAS 671-676 ante): see s 3(2).

4 For the meaning of 'court' see PARA 666 note 6 ante.

5 Inheritance (Provision for Family and Dependants) Act 1975 s 3(2).

6 Elderly applicants with a limited life expectancy are more likely to be awarded periodical payments or settled property but lump sum awards are not uncommon: see *Re Rowlands*[1984] FLR 813; *Re Bunning*, *Bunning v Salmon*[1984] Ch 480, [1984] 3 All ER 1; *Stead v Stead*[1985] FLR 16, CA; *Kusminow v Barclays Bank Trust Co Ltd* [1989] Fam Law 66; *Moody v Stevenson*[1992] Ch 486, [1992] 2 All ER 524, CA; *Re Krubert*[1997] Ch 97, [1996] 3 WLR 959, CA. As to the orders which the court can make see PARA 691 post.

7 Inheritance (Provision for Family and Dependants) Act 1975 s 3(2)(a). Pre-marital co-habitation should not be fully equated with years of marriage but it is a relevant consideration: *Kokosinski v Kokosinski*[1980] Fam 72, [1980] 1 All ER 1106 (a decision under the Matrimonial Causes Act 1973); *Foley v Foley*[1981] Fam 160, [1981] 2 All ER 857, CA (a decision under the Matrimonial Causes Act 1973). Cf *Campbell v Campbell*[1976] Fam 347, [1977] 1 All ER 1 (pre-marital cohabitation does not lengthen marriage); but see *Graham v Murphy*[1997] 1 FLR 860 (a decision concerning an applicant under the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(e) where the nine years non-dependent cohabitation was taken into account in addition to the nine years of maintenance). See also *Re Rowlands*[1984] FLR 813 (43 years of separation in a marriage of 62 years, applicant widow awarded only £3,000 out of an estate of £100,000).

For examples of awards made to applicants after short marriages see *Re Clarke*, *Clarke v Roberts*[1968] 1 All ER 451, [1968] 1 WLR 415 (widow who was able to support herself awarded net income of half of deceased's estate for life after marriage of only three years' duration including seven months of cohabitation); *Moody v Stevenson* [1992] Ch 486, [1992] 2 All ER 524, CA (marriage of 17 years' duration of which the deceased spent the last four in a nursing home; applicant awarded a life interest in the matrimonial home); *Davis v Davis*[1993] 1 FLR 54, [1993] 1 FCR 1002, CA (marriage of seven years' duration; gift of £15,000 to wife shortly before death together with chattels and life interest in remainder of estate not unreasonable provision); and see *Re Pugh*, *Pugh v Pugh*[1943] Ch 387, [1943] 2 All ER 361.

8 Inheritance (Provision for Family and Dependants) Act 1975 s 3(2)(b). See eg *Re Snoek* (1983) 13 Fam Law 18; *Re Rowlands*[1984] FLR 813; *Re Bunning*, *Bunning v Salmon*[1984] Ch 480, [1984] 3 All ER 1; *Stead v Stead*[1985] FLR 16, CA; *Moody v Stevenson*[1992] Ch 486, [1992] 2 All ER 524, CA; *Davis v Davis*[1993] 1 FLR 54, [1993] 1 FCR 21, CA; *Re Krubert*[1997] Ch 97, [1996] 3 WLR 959, CA. In assessing the contribution made to the welfare of the family of the deceased the court will take into account the conduct of the applicant and the deceased: see *Re Borthwick*, *Borthwick v Beauvais (No 2)*[1949] Ch 395, [1949] 1 All ER 472; *Thornley v Palmer*[1969] 3 All ER 31, [1969] 1 WLR 1037; *Re Clarke*, *Clarke v Roberts*[1968] 1 All ER 451, [1968] 1 WLR 415; *Re Gregory*, *Gregory v Goodenough*[1971] 1 All ER 497, [1970] 1 WLR 1455, CA; *Re Snoek* supra.

9 Inheritance (Provision for Family and Dependants) Act 1975 s 3(2). No greater prominence is to be given to this requirement than to any other requirement in s 3: *Re Krubert*[1997] Ch 97, [1996] 3 WLR 959, CA. As to the difficulty in comparing the situation on death with that on divorce (where both parties are still alive) see *Re Bunning*, *Bunning v Salmon*[1984] Ch 480, [1984] 3 All ER 1 (award on divorce would be £36,000 but was £60,000 on an application for financial provision); *Re Besterman*, *Besterman v Grusin*[1984] Ch 458, [1984] 2 All ER 656, CA. See also *Eyre v Eyre*[1968] 1 All ER 968, [1968] 1 WLR 530; *Re Fullard*, *Fullard v King*[1982] Fam 42, [1981] 2 All ER 796, CA; *Re Farrow*[1987] 1 FLR 205, [1987] Fam Law 14; *Whiting v Whiting*[1988] 2 All ER 275, [1988] 1 WLR 565, CA; *Moody v Stevenson*[1992] Ch 486, [1992] 2 All ER 524, CA; *Jessop v Jessop*[1992] 1 FLR 591, CA; *Davis v Davis*[1993] 1 FLR 54, [1993] 1 FCR 1002, CA (a life interest was reasonable although this would not have been ordered on divorce).

UPDATE

677 The wife or husband of the deceased

TEXT AND NOTES--Inheritance (Provision for Family and Dependants) Act 1975 s 3(2) amended: Civil Partnership Act 2004 Sch 4 para 17, Sch 30.

NOTE 9--See also *Cunliffe v Fielden* [2005] EWCA Civ 1508, [2006] Ch 361; *Re Baker; Baker v Baker*[2008] EWHC 977 (Ch), [2008] WTLR 1317, [2008] All ER (D) 312 (Mar); and *Re Waite; Barron v Woodhead*[2008] EWHC 810 (Ch), [2009] 2 FCR 631.

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678. The former wife or former husband of the deceased who has not remarried.

On an application for an order¹ by the deceased's former wife or husband who has not remarried², in addition to the common statutory guidelines³, the court⁴ must also have regard to⁵: (1) the applicant's age⁶ and the duration of the marriage⁷; and (2) the contribution made by the applicant to the welfare of the deceased's family, including any contribution made by looking after the home or caring for the family⁸.

In general, on an application by such an applicant reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for him to receive for his maintenance⁹. Where, however, within 12 months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation¹⁰ has been granted, a party to the marriage dies and:

- (a) an application for a financial provision order¹¹ or a property adjustment order¹² under the Matrimonial Causes Act 1973 has not been made by the other party to that marriage¹³; or
- (b) such an application has been made but the proceedings on it have not been determined at the time of the death of the deceased¹⁴,

then, if an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975¹⁵ is made by that other party the court, notwithstanding the provisions of that Act¹⁶, has power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be¹⁷. In such a case reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance¹⁸.

¹ le under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARA 691 post): see s 3(2).

² le made by virtue of *ibid* s 1(1)(b) (see PARA 667 ante): see s 3(2). For the meanings of 'former wife' and 'former husband' see PARA 667 note 5 ante.

³ le *ibid* s 3(1) (see PARAS 671-676 ante): see s 3(2).

⁴ For the meaning of 'court' see PARA 666 note 6 ante.

⁵ Inheritance (Provision for Family and Dependents) Act 1975 s 3(2).

⁶ For relevant case law see PARA 677 note 6 ante. As to the orders which the court can make see PARA 691 post.

7 Inheritance (Provision for Family and Dependants) Act 1975 s 3(2)(a). For relevant case law see PARA 677 note 7 ante.

8 Ibid s 3(2)(b). For relevant case law see PARA 677 note 8 ante.

9 See ibid s 1(2)(b); and PARA 670 ante.

10 This provision does not apply in relation to a decree of judicial separation unless at the date of the death of the deceased the decree was in force and the separation was continuing: ibid s 14(2).

11 Ie under the Matrimonial Causes Act 1973 s 23 (as amended): see the Inheritance (Provision for Family and Dependants) Act 1975 s 14(1)(a). Any reference in the Inheritance (Provision for Family and Dependants) Act 1975 to an order or decree made under the Matrimonial Causes Act 1973 or under any section of that Act is to be construed as including a reference to an order or decree which is deemed to have been made under that Act or under that provision of that Act, as the case may be: Inheritance (Provision for Family and Dependants) Act 1975 s 25(6).

12 Ie under the Matrimonial Causes Act 1973 s 24: see the Inheritance (Provision for Family and Dependants) Act 1975 s 14(1)(a).

13 Ibid s 14(1)(a).

14 Ibid s 14(1)(b).

15 Ie an order under ibid s 2 (see PARAS 691-692 post): see s 14(1).

16 Ie notwithstanding ibid ss 1, 3 (both as amended) (see PARAS 668-671 ante): see s 14(1).

17 Ibid s 14(1).

18 See ibid s 1(2)(a); and PARA 669 ante.

UPDATE

678 The former wife or former husband of the deceased who has not remarried

TEXT AND NOTES 1-8--Inheritance (Provision for Family and Dependants) Act 1975 s 3(2) amended: Civil Partnership Act 2004 Sch 4 para 17, Sch 30.

TEXT AND NOTES 10-17--See also Inheritance (Provision for Family and Dependants) Act 1975 s 14A (added by Civil Partnership Act 2004 Sch 4 para 20) (provision as to cases where no financial relief was granted in proceedings for the dissolution etc of a civil partnership).

NOTE 11--See also Inheritance (Provision for Family and Dependants) Act 1975 s 25(6A) (added by Civil Partnership Act 2004 Sch 4 para 27(6)).

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679. Cohabitees.

On an application for an order¹ by a person other than the husband or wife² or former husband or former wife³ of the deceased who, if the deceased died on or after 1 January 1996⁴, was living in the same household as the deceased as the husband or wife⁵ of the deceased during the whole of the period of two years⁶ ending immediately before⁷ the date when the deceased

died⁸, in addition to the common statutory guidelines⁹, the court¹⁰ must also have regard to¹¹: (1) the applicant's age¹² and the length of the period during which the applicant lived as the husband or wife of the deceased and in the same household as the deceased¹³; and (2) the contribution made by the applicant to the welfare of the deceased's family, including any contribution made by looking after the home or caring for the family¹⁴.

On an application by such an applicant reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for him to receive for his maintenance¹⁵.

1 le under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARA 691 post): see s 3(2).

2 As to applications made by the husband or wife of the deceased see PARA 677 ante.

3 As to applications made by the former husband or wife of the deceased see PARA 678 ante. For the meanings of 'former wife' and 'former husband' see PARA 667 note 5 ante.

4 See PARA 667 note 6 ante.

5 As to the meaning of 'living as husband or wife' see PARA 667 note 6 ante.

6 Applicants who have cohabited in this way for less than two years may satisfy the test of dependency under the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(e): see PARAS 667 ante, 681 post.

7 For examples of the meaning of 'immediately before' see PARA 667 note 10 ante.

8 le made by virtue of the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(ba) (as added) (see PARA 667 ante): see s 3(2A) (as added: see note 10 infra). See also *Re Watson* [1999] 1 FLR 878; and PARA 667 note 6 ante.

9 le the Inheritance (Provision for Family and Dependants) Act 1975 s 3(1) (see PARAS 671-676 ante): see s 3(2A) (as added: see note 11 infra).

10 For the meaning of 'court' see PARA 666 note 6 ante.

11 Inheritance (Provision for Family and Dependants) Act 1975 s 3(2A) (added by the Law Reform (Succession) Act 1995 s 2(1), (4)).

12 See *Re Watson* [1999] 1 FLR 878 (applicant cohabited with the deceased for 10 years).

13 Inheritance (Provision for Family and Dependants) Act 1975 s 3(2A)(a) (as added: see note 11 supra). For examples in the case of applications brought by a spouse or former spouse of the deceased see PARA 677 notes 7-8 ante.

14 Ibid s 3(2A)(b) (as added: see note 11 supra). For examples in the case of applications brought by a spouse or former spouse of the deceased see PARA 677 note 8 ante.

15 See ibid s 1(2)(b); and PARA 670 ante.

UPDATE

679 Cohabitees

TEXT AND NOTE 13--Inheritance (Provision for Family and Dependants) Act 1975 s 3(2A) (a) amended: Civil Partnership Act 2004 Sch 4 para 18.

Guidelines applicable to Particular Applicants/680. A child of the deceased or a person treated as a child of the deceased.

680. A child of the deceased or a person treated as a child of the deceased.

On an application for an order¹ by a child of the deceased² or a person treated by the deceased as a child of the family³, in addition to the common statutory guidelines⁴, the court⁵ must also have regard to the manner in which the applicant was being or in which he might expect to be educated or trained⁶.

Where the application is made by a person treated as a child of the family the court must also have regard to: (1) whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility⁷; (2) whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child⁸; and (3) the liability of any other person to maintain the applicant⁹.

Whether the child is an adult or a minor¹⁰, in no case is there an invariable prerequisite that the child must show that the deceased had a moral obligation¹¹ to maintain him or that there is some other special circumstance which entitled him to seek provision¹².

In the case of adult children, while it is not necessary to show that the deceased had such a moral obligation to maintain the applicant, an adult child who is in employment, with an earning capacity for the foreseeable future is unlikely to succeed in his application without some special circumstance such as a moral obligation¹³.

On an application by such an applicant reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for him to receive for his maintenance¹⁴.

1 Ie under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARA 691 post): see s 3(3).

2 Ie an applicant under *ibid* s 1(1)(c) (see PARA 667 ante): see s 3(3). For the meaning of 'child' see PARA 667 note 7 ante.

3 Ie an applicant under *ibid* s 1(1)(d) (see PARA 667 ante): see s 3(3). As to the meaning of a 'person treated by the deceased as a child of the family' see PARA 667 note 9 ante.

4 Ie *ibid* s 3(1) (see PARAS 671-676 ante): see s 3(3).

5 For the meaning of 'court' see PARA 666 note 6 ante.

6 Inheritance (Provision for Family and Dependants) Act 1975 s 3(3).

7 *Ibid* s 3(3)(a).

8 *Ibid* s 3(3)(b).

9 *Ibid* s 3(3)(c).

10 Minor children have a strong claim for financial provision: *Re C* [1995] 2 FLR 24.

11 In the case of minor children the existence of a moral obligation is usually self evident. The decisions relate to adult children see eg *Mastaka v Midland Bank Executor and Trustee Co Ltd* [1941] Ch 192 (sub nom *Re White, Mastaka v Midland Bank Executor Trustee Co Ltd and Lauderdale* [1941] 1 All ER 236); *Re Watkins, Hayward v Chatterton* [1949] 1 All ER 695; *Re Black* (1953) Times, 25 March; *Re Andrews, Andrews v Smorfit* [1955] 3 All ER 248, [1955] 1 WLR 1105 (69 year old daughter who was at times estranged from the deceased; no moral obligation to provide for her once she had left to set up home with another man whom she never married); *Re Ducksbury, Ducksbury v Ducksbury* [1966] 2 All ER 374, [1966] 1 WLR 1226 (adult daughter

capable of earning her own living awarded £2 per week); *Sivyer v Sivyer* [1967] 3 All ER 429, [1967] 1 WLR 1482 (conflict between obligations to child and third wife); *Millward v Shenton* [1972] 2 All ER 1025, [1972] 1 WLR 711, CA (adult child with progressive illness and limited earning capacity); *CA v CC* (1978) Times, 18 November (sub nom *Re McC's Estate* (1979) 9 Fam Law 26); *Re Christie, Christie v Keeble* [1979] Ch 168, [1979] 1 All ER 546 (mother had expressed intention to benefit son and daughter on equal footing, gift of property to son ineffective, adult son successful); *Re Coventry, Coventry v Coventry* [1980] Ch 461, [1979] 3 All ER 815, CA (adult son failed to show moral obligation); *Re Dennis, Dennis v Lloyds Bank Ltd* [1981] 2 All ER 140, 124 Sol Jo 885 (desire for payment of capital sum to creditors was not an application for maintenance, application by adult son failed); *Re Callaghan* [1985] Fam 1, [1984] 3 All ER 790 (adult stepson awarded £15,000 out of estate worth £31,000); *Re Leach, Leach v Lindeman* [1986] Ch 226, [1985] 2 All ER 754, CA (adult stepdaughter who never lived in the deceased's household and was never maintained by the deceased awarded half of the net estate); *Re Debenham* [1986] 1 FLR 404 (moral obligation to 58 year old epileptic daughter rejected by mother since birth; applicant awarded capital sum of £3,000 for immediate needs and income of £4,500 per annum out of estate worth £172,000); *Williams v Johns* [1988] 2 FLR 475 (a physically fit, 43 year old adoptive daughter who was capable of maintaining herself was unable to show that the deceased had any obligation to maintain her; the applicant had not cared for and, in the past, had caused shame and distress to the deceased); *Re Jennings* [1994] Ch 286, [1994] 3 All ER 27, CA (application by adult son failed; mere blood relationship did not give rise to an enduring moral obligation); *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63, [1997] 1 WLR 1216, CA (adult son's application was successful because of moral obligation imposed on deceased by his former wife's mistaken belief that wills were mutually binding); *Re Hancock* [1998] 2 FLR 346, CA (an adult daughter with no earning capacity who had left home at 19 to live with a man who now had no resources save his pension and disability benefits awarded periodical payments of £3,000 per annum); *Re Pearce* [1998] 2 FLR 705, CA (an adult son who worked on his father's farm between the ages of 6 and 16 and left only because the deceased could not afford to pay him was awarded a tax free legacy of £85,000 out of an estate worth £285,000); *Espinosa v Bourke* [1999] 1 FLR 747, CA (55 year old daughter, long out of employment, in financial need and with doubtful earning capacity did not have to show moral obligation; the deceased was under an obligation arising from his promise to leave his wife's portfolio of shares to the daughter).

12 See *Re Pearce* [1998] 2 FLR 705 at 710, CA, per Nourse LJ; and the cases referred to in note 11 supra. See also *Re Hancock* [1998] 2 FLR 346, CA; *Espinosa v Bourke* [1999] 1 FLR 747 at 755, CA, per Butler-Sloss LJ; *Re Watson* [1999] 1 FLR 878; cf *Re Coventry, Coventry v Coventry* [1980] Ch 461, [1979] 3 All ER 815, CA; *Re Jennings* [1994] Ch 286, [1994] 3 All ER 27, CA.

13 *Re Hancock* [1998] 2 FLR 346 at 351, CA, per Butler-Sloss LJ; *Re Pearce* [1998] 2 FLR 705 at 710, CA, per Nourse LJ; *Espinosa v Bourke* [1999] 1 FLR 747 at 755, CA, per Butler-Sloss LJ. Following the decision in *Re Hancock* supra the moral obligation requirement derived from *Re Coventry, Coventry v Coventry* [1980] Ch 461, [1979] 3 All ER 815, CA is of less rigid application but in many of the successful cases since *Re Coventry, Coventry v Coventry* supra the applicant has been able to rely on a moral obligation such as a promise made by the deceased to another: see eg *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63, [1997] 1 WLR 1216, CA; *Espinosa v Bourke* supra. The older decisions are more eclectic: see eg the cases referred to in note 11 supra.

14 See *ibid* s 1(2)(b); and PARA 670 ante.

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681. A person being maintained by the deceased.

On an application for an order¹ by a person who, immediately before² the death of the deceased was being maintained, either wholly or partly, by the deceased³, in addition to the common statutory guidelines⁴, the court⁵ must also have regard to the extent to which and the basis upon which the deceased assumed responsibility⁶ for the maintenance of the applicant and to the length of time⁷ for which he discharged that responsibility⁸.

On an application by such an applicant reasonable financial provision means such financial provision as it would be reasonable in all the circumstances of the case for him to receive for his maintenance⁹.

1 le under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARA 691 post): see s 3(4).

2 As to the meaning of 'immediately before' see PARA 667 note 10 ante.

3 le an applicant under the Inheritance (Provision for Family and Dependants) Act 1975 s 1(1)(e) (see PARA 667 ante): see s 3(4). Before the court can consider whether reasonable financial provision has been made for such an applicant, the applicant must satisfy the court that he is a person who was being maintained by the deceased: *Re Wilkinson, Neale v Newell* [1978] Fam 22, [1978] 1 All ER 221. As to what constitutes maintenance see PARA 667 note 11 ante.

4 le the Inheritance (Provision for Family and Dependants) Act 1975 s 3(1) (see PARAS 671-676 ante): see s 3(4).

5 For the meaning of 'court' see PARA 666 note 6 ante.

6 An assumption of responsibility can usually be presumed where the applicant is able to prove actual maintenance: *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29, CA. Decisions relating to such applicants include eg *Re Wilkinson, Neale v Newell* [1978] Fam 22, [1978] 1 All ER 221 (sister providing free board and lodging); *Malone v Harrison* [1979] 1 WLR 1353 (mistress); *Re Beaumont, Martin v Midland Bank Trust Co Ltd* [1980] Ch 444, [1980] 1 All ER 266 (claim failed; applicant and deceased were two individuals pooling resources without either undertaking any responsibility for maintaining the other); *Jelley v Iliffe* supra (provision of rent-free accommodation; common law husband); *Kourkgy v Lusher* (1981) 4 FLR 65, 12 Fam Law 86; *Harrington v Gill* (1983) 4 FLR 265, CA (provision of rent-free accommodation; common law wife); *Williams v Roberts* [1986] 1 FLR 349 (gifts of lump sums, weekly allowance and provision of accommodation; common law wife); *Bishop v Plumley* [1991] 1 All ER 236, [1991] 1 WLR 582, CA (provision of rent-free accommodation; common law wife); *Graham v Murphy* [1997] 1 FLR 860 (common law husband); *Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041 (friend paying less than market rent); *Re B* [2000] 1 All ER 665, CA (assumption of responsibility for mother by mentally handicapped daughter).

7 See *Malone v Harrison* [1979] 1 WLR 1353 (maintenance for 12 years); *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29, CA (maintenance for eight years); *Harrington v Gill* (1983) 4 FLR 265 (maintenance for eight years); *Williams v Roberts* [1986] 1 FLR 349 (maintenance for nine years); *Bishop v Plumley* [1991] 1 All ER 236, [1991] 1 WLR 582, CA (maintenance for ten years); *Graham v Murphy* [1997] 1 FLR 860 (maintenance for nine years after some nine years non-dependent cohabitation); *Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041 (maintenance for nine years).

8 Inheritance (Provision for Family and Dependants) Act 1975 s 3(4).

9 See *ibid* s 1(2)(b); and PARA 670 ante. Awards include *Harrington v Gill* (1983) 4 FLR 265 (£10,000 for common law wife out of estate of £65,000); *Williams v Roberts* [1986] 1 FLR 349 (£20,000 for common law wife out of estate of £120,000); *Graham v Murphy* [1997] 1 FLR 860 (£35,000 to enable applicant to purchase smaller property in less expensive area with assistance of a small mortgage); *Rees v Newbery and Institute of Cancer Research* [1998] 1 FLR 1041 (capitalised value of difference between rent payable by applicant and market rent in exchange for applicant surrendering possession of flat held at a low rent without security).

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(4) PROPERTY AVAILABLE FOR FINANCIAL PROVISION

(i) Property always Available

682. Meaning of net estate.

In relation to a deceased person, 'net estate'¹ means:

- (1) all property² of which the deceased had power to dispose by his will³ (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities, including any inheritance tax payable out of his estate on his death⁴;
- (2) any property in respect of which the deceased held a general power of appointment (not being a power exercisable by will) which has not been exercised⁵;
- (3) any sum of money or other property which is treated for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975 as part of the deceased's net estate by virtue of the provisions of the Act relating to nominees⁶ and gifts mortis causa⁷ or by virtue of an order relating to property held on a joint tenancy⁸; and
- (4) any sum of money or other property which is, by reason of a disposition or contract made by the deceased, ordered⁹ to be provided for the purpose of the making of financial provision under the Act¹⁰.

1 Any reference in the Inheritance (Provision for Family and Dependents) Act 1975 to provision out of the net estate of a deceased person includes a reference to provision extending to the whole of that estate: s 25(3).

2 'Property' includes any chose in action: *ibid* s 25(1). For these purposes, 'property' does not include property nominated under a pension fund trust deed: *Jessop v Jessop* [1992] 1 FLR 591 at 594, 599, CA, per Nourse J; *Re Cairnes, Howard v Cairnes* (1982) 4 FLR 225. 'Property' is not restricted to property solely within the United Kingdom: *Bheekhun v Williams* [1999] Fam Law 379, CA.

3 For the meaning of 'will' see PARA 666 note 8 ante.

4 Inheritance (Provision for Family and Dependents) Act 1975 s 25(1)(a). For this purpose a person who is not of full age and capacity is to be treated as having power to dispose by will of all property of which he would have had power to dispose by will if he had been of full age and capacity: s 25(2). As to powers of appointment see POWERS.

5 *Ibid* s 25(1)(b).

6 *Ie* by virtue of *ibid* s 8(1) (see PARA 683 post): see s 25(1)(c).

7 *Ie* by virtue of *ibid* s 8(2) (see PARA 684 post): see s 25(1)(c).

8 *Ibid* s 25(1)(c), (d). Orders relating to joint tenancies are made under s 9 (see PARA 685 post): see s 25(1)(d).

9 *Ie* under *ibid* s 10 or s 11 (see PARAS 686-690 post): see s 25(1)(e).

10 *Ibid* s 25(1)(e).

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683. Nominees.

Where a deceased person has in accordance with the provisions of any enactment¹ nominated any person to receive any sum of money or other property² on his death and that nomination is in force at the time of his death, that sum of money, after deducting from it any inheritance tax³ payable in respect of it, or that other property, to the extent of its value at the date of the death of the deceased after deducting from it any inheritance tax so payable, is to be treated for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975 as part of the net estate⁴ of the deceased⁵.

This provision does not render liable any person who gives effect to a statutory nomination by paying any sum or transferring any other property to the person named in the nomination in accordance with the directions given in the nomination⁶.

1 Property nominated under a pension fund, even if made pursuant to a statutory regulation, is not nominated pursuant to an enactment: *Re Cairnes, Howard v Cairnes* (1982) 4 FLR 225. See also *Rathbone v Bundock* [1962] 2 QB 260, [1962] 2 All ER 257.

2 For the meaning of 'property' see PARA 682 note 2 ante.

3 The amount of inheritance tax to be deducted for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975 s 8(1) must not exceed the amount of that tax which has been borne by the person nominated by the deceased: s 8(3). As to inheritance tax see INHERITANCE TAXATION.

4 For the meaning of 'net estate' see PARA 682 ante.

5 Inheritance (Provision for Family and Dependents) Act 1975 s 8(1).

6 Ibid s 8(1). The provisions of the Inheritance (Provision for Family and Dependents) Act 1975 do not render personal representatives liable for having distributed any part of the estate after the end of six months from the date on which representation with respect to the estate of the deceased is first taken out: see s 20(1); and PARA 697 post.

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684. Gifts mortis causa.

Where any sum of money or other property¹ is received by any person as a donatio mortis causa² made by a deceased person, that sum of money, after deducting from it any inheritance tax³ payable on it, or that other property, to the extent of its value at the date of the death of the deceased after deducting from it any inheritance tax so payable, is to be treated for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975 as part of the net estate⁴ of the deceased⁵.

This provision does not render liable a person who gives effect to a donatio mortis causa by paying any sum or transferring any other property⁶.

1 For the meaning of 'property' see PARA 682 note 2 ante.

2 As to gifts mortis causa see generally GIFTS vol 52 (2009) PARA 271 et seq.

3 The amount of inheritance tax to be deducted for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975 s 8(2) must not exceed the amount of that tax which has been borne by the person who has received a sum of money or other property as a donatio mortis causa: s 8(3). As to inheritance tax see INHERITANCE TAXATION.

4 For the meaning of 'net estate' see PARA 682 ante.

5 Inheritance (Provision for Family and Dependents) Act 1975 s 8(2). A gift made in contemplation of death and conditional upon death is treated as part of the net estate of the deceased whether made with the intention of defeating a claim for family provision or not whereas the property comprising an unconditional gift is only treated as part of the net estate of the deceased if made with an intention to defeat a claim for family provision and the court so orders: see s 10; and PARA 686 et seq post.

6 Ibid s 8(2).

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(ii) Property Available if the Court so Orders

685. Property held on a joint tenancy.

Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property¹, then, if, before the end of the period of six months from the date on which representation with respect to his estate was first taken out², an application is made for an order under the Inheritance (Provision for Family and Dependants) Act 1975³, the court⁴ for the purpose of facilitating the making of financial provision for the applicant under the Act may order that the deceased's severable share of that property, at its value immediately before his death⁵, is, to such extent as appears to the court to be just in all the circumstances of the case, to be treated for the purposes of the Act as part of his net estate⁶.

In determining the extent to which any severable share is to be treated as part of the net estate of the deceased by virtue of such an order, the court must have regard to any inheritance tax payable in respect of that severable share⁷.

1 For the meaning of 'property' see PARA 682 note 2 ante. For the purposes of this provision there may be a joint tenancy of a chose in action: Inheritance (Provision for Family and Dependants) Act 1975 s 9(4). As to joint tenancies see REAL PROPERTY vol 39(2) (Reissue) PARA 190 et seq. As to choses in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq. These provisions apply to a policy of insurance and the right to policy monies under it (*Powell v Osbourne*[1993] 1 FLR 1001 at 1004, CA) and to money held in a joint bank account (*Re Crawford*(1982) 4 FLR 273).

2 There is no power to make an order in respect of the deceased's severable share of joint property where an application is made late notwithstanding the broad discretion to extend time if an application for an order for family provision is not made within this period: see the Inheritance (Provision for Family and Dependants) Act 1975 s 4; and PARA 697 post.

3 I.e. under *ibid* s 2 (see PARAS 691-692 post): see s 9(1).

4 For the meaning of 'court' see PARA 666 note 6 ante.

5 The value of a severable share of joint insurance policy immediately before death is assessed with regard to the imminence of death so that when the value of the property in question depends upon the death, as with a life policy, the value before death is effectively the same as the value upon death: *Powell v Osbourne*[1993] 1 FLR 1001, CA.

6 Inheritance (Provision for Family and Dependants) Act 1975 s 9(1). For the meaning of 'net estate' see PARA 682 ante. The court has a very broad discretion and no guidelines beyond those contained in s 9(1): *Re Crawford*(1982) 4 FLR 273 at 280 per Eastham J; *Kourgky v Lusher*(1981) 4 FLR 65. See *Powell v Osbourne*[1993] 1 FLR 1001, CA (severable share in life policy treated as part of net estate); *Jessop v Jessop*[1992] 1 FLR 591, CA (severable share in beneficial joint tenancy in house taken partially into account); *Kourgky v Lusher* supra (severable share in beneficial joint tenancy in matrimonial home not taken into account). Where an order is made under the Inheritance (Provision for Family and Dependants) Act 1975 s 9(1) the provisions of s 9 do not render any person liable for anything done by him before the order was made: s 9(3).

7 *Ibid* s 9(2). As to inheritance tax see INHERITANCE TAXATION.

UPDATE

685 Property held on a joint tenancy

NOTE 6--See *Murphy v Murphy*[2003] EWCA Civ 1862, [2004] Lloyd's Rep IR 744 (deceased not entitled to joint tenancy of the benefit payable under a life insurance policy if his death occurred first when both he and the other party to the policy intended the survivor to have the exclusive benefit of the policy); *Dingmar v Dingmar*[2006] EWCA Civ 942, [2007] Ch 109 (widow entitled to half of matrimonial home notwithstanding increase in property prices since death of deceased who had been joint tenant of the home with a third party).

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686. Applications in respect of dispositions intended to defeat applications for financial provision.

The court¹ has power to make an order² where, on an application for an order for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975³, the applicant, in the proceedings on that application applies to the court⁴, and the court is satisfied that:

- (1) less than six years before the date of his death, the deceased, with the intention⁵ of defeating an application for financial provision under the Act, made a disposition⁶;
- (2) full valuable consideration⁷ for that disposition was not given by the donee⁸ or by any other person⁹; and
- (3) the exercise of the powers conferred by this provision would facilitate the making of financial provision for the applicant under the Act¹⁰.

If the court is so satisfied, it may¹¹, subject to the provisions of the Act¹², order the donee¹³ (whether or not at the date of the order he holds any interest in the property¹⁴ disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order¹⁵.

Where such an order is made as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the amount of any sum of money or the value of any property so ordered to be provided must not exceed the amount of the payment made by the deceased after deducting from it any inheritance tax borne by the donee in respect of that payment¹⁶.

Where such an order is made as respects any disposition made by the deceased which consisted of the transfer of property (other than a sum of money) to or for the benefit of the donee, the amount of any sum of money or the value of any property so ordered to be provided must not exceed the value at the date of the deceased's death of the property disposed of by him to or for the benefit of the donee, or, if that property has been disposed of by the person to whom it was transferred by the deceased, the value at the date of that disposal, after deducting from it any inheritance tax borne by the donee in respect of the transfer of that property by the deceased¹⁷.

1 For the meaning of 'court' see PARA 666 note 6 ante.

2 le an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 10(2): see s 10(1).

3 le under ibid s 2 (see PARAS 691-692 post): see s 10(1).

4 Ibid s 10(1).

5 This condition is fulfilled if the court is of the opinion that, on a balance of probabilities, the deceased's intention (though not necessarily his sole intention) in making the disposition was to prevent an order for financial provision being made or to reduce the amount of the provision which might otherwise be granted: ibid s 12(1). The requisite intention is subjective: *Re Dawkins, Dawkins v Judd* [1986] 2 FLR 360. See also *Kemmis v Kemmis* [1988] 1 WLR 1307, [1988] 2 FLR 223, CA; *Re Weir* [1993] 2 NIJB 45. The deceased need not have had the existence of the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 present to his mind when making the disposition but must have intended to defeat a claim made after his death against his estate: *Re Kennedy, Kennedy v Official Solicitor to the Supreme Court* [1980] CLY 2820.

6 Inheritance (Provision for Family and Dependants) Act 1975 s 10(2)(a). For these purposes, 'disposition' does not include: (1) any provision in a will, any such nomination as is mentioned in s 8(1) (see PARA 683 ante) or any donatio mortis causa (see PARA 684 ante); or (2) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment: s 10(7). However, subject to these exceptions, 'disposition' includes any payment of money (including the payment of a premium under a policy of assurance) and any conveyance, assurance, appointment or gift of property of any description, whether made by an instrument or otherwise: s 10(7). Section 10 does not apply to any disposition made before 1 April 1976: ss 10(8), 27(3). For the meaning of 'will' see PARA 666 note 8 ante. A release of a valuable right such as a right to reside in a house for life is a disposition for these purposes: *Clifford v Tanner* (10 June 1986) Lexis, Enggen Library, Cases File, CA. The service of a notice ending a joint tenancy is not a disposition for the purposes of the Matrimonial Causes Act 1973 s 37 (as amended) (avoidance of transactions intended to prevent or reduce financial relief): *Bater v Bater* [1999] 4 All ER 944, CA.

7 For the meaning of 'valuable consideration' see PARA 667 note 11 ante.

8 'Donee' means the person to whom or for the benefit of whom the disposition was made: Inheritance (Provision for Family and Dependants) Act 1975 s 10(2)(b). Where a disposition is made to a person as a trustee, 'donee' includes the trustee for the time being of the trust in question: s 13(3).

9 Ibid s 10(2)(b).

10 Ibid s 10(2)(c).

11 For the general considerations to which the court must have regard in determining an application under ibid s 10 see PARA 689 post.

12 le subject to ibid ss 10, 12, 13 (see the text to notes 13-17 infra; and PARA 687 et seq post): see s 10(2).

13 The court's power to order the donee to provide a sum of money or property is exercisable in like manner in relation to the donee's personal representative, but the court has no power to make an order in respect of any property forming part of the donee's estate which has been distributed by the personal representative, who is not to be liable for having distributed any such property before he has notice of the making of an application under ibid s 10, on the ground that he ought to have taken into account the possibility that such an application would be made: s 12(4). See further PARA 690 post.

14 For the meaning of 'property' see PARA 682 note 2 ante.

15 Inheritance (Provision for Family and Dependants) Act 1975 s 10(2). 'Property' includes any chose in action and a policy of insurance and the right to policy monies thereunder: *Powell v Osbourne* [1993] 1 FLR 1001 at 1004, CA. Where the court makes an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 10, it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for receiving a fair adjustment of the rights of the persons affected by it: s 12(3).

16 Ibid s 10(3). As to inheritance tax see INHERITANCE TAXATION.

17 Ibid s 10(4). Where the power to make the order is exercised in relation to the donee's personal representative (see note 13 supra), the reference in s 10(4) to the disposal of property by the donee includes a reference to disposal by his personal representative: s 12(4)(a). A release of a valuable right such as a right to reside in a house for life is a disposition for these purposes and the value is the amount that a person would pay for its release: *Clifford v Tanner* (10 June 1986) Lexis, Enggen Library, Cases File, CA.

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687. Subsidiary applications.

Where an original application for an order in respect of a disposition intended to defeat an application for financial provision is made¹ in relation to any disposition, the donee² or any applicant for an order for financial provision³ may make an application on which the court⁴ may exercise further special powers⁵ if it is satisfied that:

- (1) less than six years before the date of the deceased's death, the deceased with the intention⁶ of defeating an application for financial provision under the Inheritance (Provision for Family and Dependents) Act 1975 made a disposition other than the disposition which is the subject of the original application⁷; and
- (2) full valuable consideration⁸ for that other disposition was not given by the person to whom or for whose benefit that other disposition was made or by any other person⁹.

If the court is so satisfied, it may exercise in relation to the person to whom or for whose benefit that other disposition was made the powers which it would have had¹⁰ if the original application had been made in respect of that other disposition and the court had been appropriately satisfied¹¹.

1 Ie an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 10(2) (see PARA 686 ante); see s 10(5).

2 Ie the person to or for whose benefit the disposition was made: see *ibid* s 10(2)(b). Where a disposition is made to a person as a trustee, 'donee' includes the trustee for the time being of the trust in question: see s 13(3).

3 Ie under *ibid* s 2 (see PARAS 691-692 post): see s 10(5). Where the power to make the order is exercised in relation to the donee's personal representative, the reference to an application by the donee includes a reference to an application by the personal representative of the donee: s 12(4)(b).

4 For the meaning of 'court' see PARA 666 note 6 ante.

5 As to the general considerations to which the court must have regard in determining an application under the Inheritance (Provision for Family and Dependents) Act 1975 s 10 see PARA 689 post.

6 See PARA 686 note 5 ante.

7 Inheritance (Provision for Family and Dependents) Act 1975 s 10(5)(a). For the meaning of 'disposition' see PARA 686 note 6 ante.

8 For the meaning of 'valuable consideration' see PARA 667 note 11 ante.

9 Inheritance (Provision for Family and Dependents) Act 1975 s 10(5)(b).

10 Ie under *ibid* s 10(2) (see PARA 686 ante): see s 10(5).

11 *Ibid* s 10(5). The court must be satisfied on an original application as to the matters set out in s 10(2) (a), (b), (c) (see PARA 686 ante): see s 10(5). Where an application is made under s 10(5), any reference in s 10 (except in s 10(2)(b)) to the donee includes a reference to the person to whom or for whose benefit that other disposition was made: s 10(5).

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688. Applications in respect of contracts to leave property by will intended to defeat applications for financial provision.

Where, on an application by the applicant in proceedings on an application for an order for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975¹ the court² may make an order if it is satisfied that:

- (1) the deceased made a contract³ by which he agreed to leave by his will⁴ a sum of money or other property⁵ to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate⁶;
- (2) the deceased made that contract with the intention⁷ of defeating an application for financial provision under the Act⁸;
- (3) when the contract was made full valuable consideration⁹ for that contract was not given or promised by the donee¹⁰ or by any other person¹¹; and
- (4) the exercise of the powers conferred by this provision would facilitate the making of financial provision for the applicant under the Act¹²,

the court may¹³, subject to the provisions of the Act¹⁴, make certain orders¹⁵.

The court may make any one or more of the following orders¹⁶:

- (a) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing him to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order¹⁷;
- (b) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer any property, or not to make any further payment or transfer any further property, as the case may be, in accordance with it or directing them only to make such payment or transfer such property as may be specified in the order¹⁸.

Where an order has been made under this provision in relation to any contract, the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach of it are subject to any adjustment made by the court¹⁹ and survive to such extent only as is consistent with giving effect to the terms of that order²⁰.

1 In the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 post): see s 11(1).

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 This provision does not apply to a contract made before 1 April 1976: Inheritance (Provision for Family and Dependants) Act 1975 ss 11(6), 27(3). Contract is not defined in the Inheritance (Provision for Family and

Dependants) Act 1975 but may include a promise to leave property by will giving rise to an estoppel (*Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498), or an arrangement to leave property by mutual wills (*Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939; *Re Dale, Proctor v Dale* [1994] Ch 31, [1993] 4 All ER 129; *Re Goodchild, Goodchild v Goodchild* [1996] 1 All ER 670, [1996] 1 WLR 694; *Birmingham v Renfrew* (1936) 57 CLR 666, Aust HC). As to mutual wills see WILLS vol 50 (2005 Reissue) PARA 308.

4 For the meaning of 'will' see PARA 666 note 8 ante.

5 For the meaning of 'property' see PARA 682 note 2 ante. 'Property' includes any chose in action and a policy of insurance and the right to policy monies under it: *Powell v Osbourne* [1993] 1 FLR 1001 at 1004, CA, per Dillon LJ.

6 Inheritance (Provision for Family and Dependants) Act 1975 s 11(2)(a). Where the court makes an order under s 11, it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected by it: s 12(3).

7 This condition is fulfilled if the court is of the opinion that, on a balance of probabilities, the deceased's intention (though not necessarily his sole intention) in making the contract was to prevent an order for financial provision being made or to reduce the amount of the provision which might otherwise be granted by an order: *ibid* s 12(1). See also PARA 686 note 5 ante.

8 *Ibid* s 11(2)(b).

9 For the meaning of 'valuable consideration' see PARA 667 note 11 ante. Where an application is made under *ibid* s 11 with respect to any contract made by the deceased and no valuable consideration was given or promised by any person for that contract then, notwithstanding anything in s 12(1) (see note 7 supra), it must be presumed, unless the contrary is shown, that the deceased made that contract with the intention of defeating an application for financial provision: s 12(2).

10 'Donee' means the person with whom or for whose benefit the contract was made: *ibid* s 11(2)(c). Where a payment is made or property is transferred in accordance with a contract to any person as a trustee, 'donee' includes a reference to the trustee or trustees for the time being of the trust in question: s 13(3).

11 *Ibid* s 11(2)(c).

12 *Ibid* s 11(2)(d).

13 As to the general considerations to which the court must have regard in determining an application under *ibid* s 11 see PARA 689 post.

14 *Ie* subject to *ibid* ss 11-13 (see PARAS 686-687 ante, 689 post): see s 11(2).

15 *Ibid* s 11(2).

16 Notwithstanding anything in *ibid* s 11(2), the court may exercise its powers under s 11(2) in relation to any contract made by the deceased only to the extent that it considers that the amount of any sum of money paid or to be paid or the value of any property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for that contract, and for this purpose the court must have regard to the value of property at the date of the hearing: s 11(3).

17 *Ibid* s 11(2)(i). This power to order the donee, in relation to any contract, to provide any sum of money or other property is exercisable in like manner in relation to the donee's personal representative, but the court has no power to make an order in respect of any property forming part of the donee's estate which has been distributed by the personal representative, who is not to be liable for having distributed any such property before he has notice of the making of an application under s 11 on the ground that he ought to have taken into account the possibility that such an application would be made: s 12(4). As to the protection of personal representatives see further PARA 690 post.

18 *Ibid* s 11(2)(ii).

19 *Ie* under *ibid* s 12(3) (see note 6 supra): see s 11(5).

20 *Ibid* s 11(5).

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689. General considerations.

In determining whether and in what manner to exercise any its powers¹ on an application in respect of a disposition or a contract to leave property by will or other disposition intended² to defeat an application for financial provision³, the court⁴ must have regard to the circumstances in which any disposition was made and any valuable consideration⁵ which was given for it, the relationship, if any, of the donee⁶ to the deceased, the donee's conduct and financial resources and all the other circumstances of the case⁷.

1 In its powers under the Inheritance (Provision for Family and Dependants) Act 1975 ss 10, 11 (see PARAS 686-688 ante): see ss 10(6), 11(4).

2 See PARA 686 note 5 ante.

3 In under the Inheritance (Provision for Family and Dependants) Act 1975 s 2: see PARAS 691-692 post.

4 For the meaning of 'court' see PARA 666 note 6 ante.

5 For the meaning of 'valuable consideration' see PARA 667 note 11 ante.

6 'Donee' means the person with whom or for whose benefit the contract was made: see the Inheritance (Provision for Family and Dependants) Act 1975 ss 10(2)(b), 11(2)(c). Where a payment is made or property is transferred in accordance with a contract to any person as a trustee, 'donee' includes a reference to the trustee or trustees for the time being of the trust in question: s 13(3).

7 Ibid ss 10(6), 11(4).

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690. Protection of trustees and personal representatives.

Where an application is made for an order in respect of a disposition made by the deceased to any person as trustee¹ or in respect of any payment made or property² transferred, in accordance with a contract made by the deceased, to any person as trustee³, the powers of the court⁴ to order that trustee to provide a sum of money or other property are subject to certain limitations⁵. The limitations are:

(1) in the case of an application in respect of a disposition which consisted of the payment of money or an application in respect of the payment of money in accordance with a contract, that the amount of any sum of money ordered to be provided must not exceed the aggregate of so much of that money as is at the date of the order in the trustee's hands and the value at that date of any property which represents that money or is derived from it and is at that date in the trustee's hands⁶; and

(2) in the case of an application in respect of a disposition which consisted of the transfer of property (other than a sum of money) or an application in respect of

the transfer of property (other than a sum of money) in accordance with a contract, the value of any property ordered to be provided must not exceed the aggregate of the value at the date of the order of so much of the property concerned as is at that date in the trustee's hands and the value at that date of any property which represents the first-mentioned property or is derived from it and is at that date in the trustee's hands⁷.

Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in pursuance of a contract to any person as a trustee, the trustee is not liable for having distributed any money or other property on the ground that he ought to have taken into account the possibility that such an application would be made⁸.

Where a deceased person entered into a contract by which he agreed to leave by his will⁹ any sum of money or other property to any person or by which he agreed that a sum of money, or other property would be paid or transferred to any person out of his estate, then, if the deceased's personal representative has reason to believe that the deceased entered into the contract with the intention of defeating an application for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975, he may, notwithstanding anything in that contract postpone the payment of that sum of money or the transfer of that property until the expiration of the period of six months from the date on which representation with respect to the deceased's estate is first taken out or, if during that period an application is made for an order for financial provision¹⁰, until the determination of the proceedings on that application¹¹.

1 Inheritance (Provision for Family and Dependants) Act 1975 s 13(1)(a). Such an order is made under s 10 (see PARAS 686-687 ante): see s 13(1)(a). 'Trustee' includes the trustee or trustees for the time being of the trust in question: see s 13(3).

2 For the meaning of 'property' see PARA 682 note 2 ante.

3 Inheritance (Provision for Family and Dependants) Act 1975 s 13(1)(b). Such an order is made under s 11 (see PARA 688 ante): see s 13(1)(b).

4 Ie under ibid s 10 or s 11 (see PARAS 686-688 ante): see s 13(1).

5 Ibid s 13(1). This is in addition, in the case of an application under s 10, to any provision regarding the deduction of inheritance tax: s 13(1). As to inheritance tax see INHERITANCE TAXATION.

6 Ibid s 13(1)(i).

7 Ibid s 13(1)(ii).

8 Ibid s 13(2).

9 For the meaning of 'will' see PARA 666 note 8 ante.

10 Ie under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 post): see s 20(3).

11 Ibid s 20(3).

(5) ORDER FOR FINANCIAL PROVISION

691. Orders which the court may make.

Subject to the provisions of the Inheritance (Provision for Family and Dependents) Act 1975, where an application is made for an order¹, the court², if it is satisfied³ that the disposition of the deceased's estate effected by his will⁴ or the law relating to intestacy⁵, or the combination of his will and that law, is not such as to make reasonable financial provision⁶ for the applicant, may make any one or more of the following orders⁷:

- (1) an order for the making to the applicant out of the net estate⁸ of the deceased of such periodical payments and for such term as may be specified in the order⁹;
- (2) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified¹⁰;
- (3) an order for the transfer to the applicant of such property¹¹ comprised in that estate as may be so specified¹²;
- (4) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified¹³;
- (5) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for its settlement for his benefit¹⁴;
- (6) an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child¹⁵ of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage¹⁶.

An order for the making of periodical payments to the applicant out of the net estate of the deceased may provide for: (a) payments of such amount as may be specified in the order¹⁷; (b) payments equal to the whole of the income of the net estate or of a portion of it as may be so specified¹⁸; (c) payments equal to the whole of the income of such part of the net estate as the court may direct to be set aside or appropriated for the purpose¹⁹; or (d) payments determined in any other way²⁰.

The order may also contain consequential provisions²¹.

1 Ie under the Inheritance (Provision for Family and Dependents) Act 1975 s 2: see s 2(1). As to applications see PARA 666 ante. As to who may apply see PARAS 667, 677-681 ante.

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 As to the matters to which the court must have regard in exercising these powers see PARAS 671-681 ante.

4 For the meaning of 'will' see PARA 666 note 8 ante.

5 As to the law relating to intestacy see PARA 583 et seq ante.

6 For the meaning of 'reasonable financial provision' see PARAS 669-670 ante.

7 Inheritance (Provision for Family and Dependents) Act 1975 s 2(1).

8 For the meaning of 'net estate' see PARA 682 ante.

9 Inheritance (Provision for Family and Dependents) Act 1975 s 2(1)(a). As to the terms of the order which may be made see the text and notes 17-20 infra. Where the order provides for the making of payments of an

amount specified in the order, the order may direct that such part of the net estate as may be so specified is to be set aside or appropriated for the making out of its income of those payments; but no larger part of the net estate may be so set aside or appropriated than is sufficient, at the date of the order, to produce by its income the amount required for the making of those payments: s 2(3). As to variation etc of orders under s 2(1)(a) see s 6; and PARA 694 post. In default of an order payments will be deemed to take effect from the date of the deceased's death: see s 19(1).

Periodical payments need not be limited to the income of the net estate: *Re Blanch, Blanch v Honhold*[1967] 2 All ER 468, [1967] 1 WLR 987; *Re F*(1965) Times, 26 February. The court has a broad discretion as to the date on which periodical payments should commence. Payments have been ordered to commence from the date of death (*Askew v Askew*[1961] 2 All ER 60, [1961] 1 WLR 725; *Re Goodwin, Goodwin v Goodwin*[1969] 1 Ch 283, [1968] 3 All ER 12; *Stead v Stead*[1985] FLR 16, CA; *Re Farrow* [1987] 1 FLR 205), from the date of the application (*Eyre v Eyre*[1968] 1 All ER 968, [1968] 1 WLR 530), and from the date of judgment (*Re Lecoche, Lecoche v Barclays Bank Ltd* (1967) 111 Sol Jo 136; *Re Debenham*[1986] 1 FLR 404). In determining the date of commencement the court will have regard to the life expectancy of the applicant, the size of the estate, the effect of the order on the administration of the estate and any delay in bringing the application: *Lusternik v Lusternik*[1972] Fam 125, [1972] 1 All ER 592, CA; *Stead v Stead* supra; *Re Debenham* supra; *Re Collins*[1990] Fam 56, [1990] 2 All ER 47.

10 Inheritance (Provision for Family and Dependants) Act 1975 s 2(1)(b). The order may provide for the payment of the lump sum by instalments of such amount as may be specified in the order: s 7(1). In such a case the court has power, on an application made by the person to whom the lump sum is payable, by the personal representatives of the deceased or by the trustees of the property out of which the lump sum is payable, to vary the order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable: s 7(2). A lump sum award may extend to the whole of the net estate: see s 25(3); and PARA 682 ante.

A lump sum order is not equivalent to an order for payment of a debt; it simply puts the applicant in the same position as a beneficiary under a will: *Re Jennery, Jennery v Jennery*[1967] Ch 280, [1967] 1 All ER 691, CA. A lump sum may be awarded to achieve a specific purpose: *Re Callaghan*[1985] Fam 1, [1984] 3 All ER 790 (purchase of a house); *Re Crawford*(1982) 4 FLR 273 (purchase of annuity). See also *Re Besterman, Besterman v Grusin*[1984] Ch 458, [1984] 2 All ER 656; *Re Bunning, Bunning v Salmon*[1984] Ch 480, [1984] 3 All ER 1; *Stead v Stead*[1985] FLR 16, CA; *Re Debenham*[1986] 1 FLR 404; *Jessop v Jessop*[1992] 1 FLR 591, CA.

The quantum of lump sum orders may be assessed on a multiplier and multiplicand basis (*Malone v Harrison* [1979] 1 WLR 1353), on the basis of capitalised periodical payments or on the *Duxbury* basis (see *Duxbury v Duxbury*[1992] Fam 62n, [1990] 2 All ER 77, CA).

11 For the meaning of 'property' see PARA 682 note 2 ante.

12 Inheritance (Provision for Family and Dependants) Act 1975 s 2(1)(c). See *Re Christie, Christie v Keeble*[1979] Ch 168, [1979] 1 All ER 546; *Rajabally v Rajabally*[1987] 2 FLR 390, CA. By analogy with cases of divorce, a contractual tenancy may be property: *Thompson v Thompson*[1976] Fam 25, [1975] 2 All ER 208, CA; *Hale v Hale*[1975] 2 All ER 1090, [1975] 1 WLR 931, CA.

13 Inheritance (Provision for Family and Dependants) Act 1975 s 2(1)(d). See *Moody v Stevenson*[1992] Ch 486, [1992] 2 All ER 524, CA; *Harrington v Gill*(1983) 4 FLR 265, CA; *Re Mason, Mason v Mason* (1975) 5 Fam Law 124.

14 Inheritance (Provision for Family and Dependants) Act 1975 s 2(1)(e).

15 For the meaning of 'child' see PARA 667 note 7 ante.

16 Inheritance (Provision for Family and Dependants) Act 1975 s 2(1)(f).

17 Ibid s 2(2)(a). As to such orders see head (1) in the text and note 9 supra.

18 Ibid s 2(2)(b). See also note 9 supra.

19 Ibid s 2(2)(c). See also note 9 supra.

20 Ibid s 2(2).

21 See PARA 692 post.

UPDATE

691 Orders which the court may make

TEXT AND NOTES 1-16--Inheritance (Provision for Family and Dependants) Act 1975 s 2(1) amended: Civil Partnership Act 2004 Sch 4 para 16.

NOTE 1--See *Cyganik v Agulian*[2006] EWCA Civ 129, [2006] 1 FCR 406.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(5) ORDER FOR FINANCIAL PROVISION/692. Consequential provisions in order.

692. Consequential provisions in order.

An order for financial provision¹ may contain such consequential and supplemental provisions as the court² thinks necessary or expedient for the purpose of giving effect to the order³ or for the purpose of securing that it operates fairly as between one beneficiary⁴ of the deceased's estate and another⁵. The court may, in particular, but without prejudice to the generality of this provision:

- (1) order any person who holds any property⁶ which forms part of the net estate⁷ of the deceased to make such payment or transfer such property as may be specified in the order⁸;
- (2) vary the disposition of the deceased's estate effected by the will⁹ or the law relating to intestacy¹⁰, or by both, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case¹¹; and
- (3) confer on the trustees of any property which is the subject of an order¹² such powers as appear to the court to be necessary or expedient¹³.

Further, the order may provide that any sum paid to the applicant by virtue of an interim order¹⁴ is to be treated to such an extent and in such manner as may be provided by the order as having been paid on account of any payment provided for by the order¹⁵.

1 Ie an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARA 691 ante); see s 2(4).

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 The court has an unfettered discretion to impose conditions: *Re Preston, Preston v Hoggarth* [1969] 2 All ER 961, [1969] 1 WLR 317. See eg *Re Pointer, Pointer and Shonfield v Edwards* [1941] Ch 60, [1940] 4 All ER 372 (condition that the applicant must inform trustees when her income exceeded a specified limit); *Re Ralphs, Ralphs v District Bank Ltd* [1968] 3 All ER 285, [1968] 1 WLR 1522 (amount paid under interim order to be brought into account against income of legacy); *Barnsley v Ward* (18 January 1980) Lexis, Enggen Library, Cases File, CA (condition requiring applicant to use best endeavours to obtain employment imposed during currency of interim award); *Re Doring, Doring v Clark* [1955] 3 All ER 389, [1955] 1 WLR 1217 (annuity payable only in the event of shortfall of income from another source).

4 For the meaning of 'beneficiary' see PARA 672 note 6 ante.

The Inheritance (Provision for Family and Dependants) Act 1975 does not specify how the diminution of the provisions of the will due to an order for maintenance is to be borne by the persons beneficially interested under the will, but the court's jurisdiction extends to enable it to order an apportionment as between residuary and pecuniary legatees: see eg *Re Westby* (1946) 62 TLR 458 (payment of maintenance out of a pecuniary legacy); *Re Simson, Simson v National Provincial Bank Ltd* [1950] Ch 38, [1949] 2 All ER 826 (payment of maintenance apportioned between legacies and residue); *Re Jackson, Jackson v Nottidge* [1952] WN 352, [1952] 2 TLR 90 (cost of annuity apportioned between legacies and residue); *Re Preston, Preston v Hoggarth* [1969] 2

All ER 961, [1969] 1 WLR 317 (lump sum award borne unequally between beneficiaries of the same class); *Re Bunning, Bunning v Salmon* [1984] Ch 480, [1984] 3 All ER 1 (lump sum award made out of residue); and see *Re Franks, Franks v Franks* [1948] Ch 62, [1947] 2 All ER 638 (application stood over because of uncertainty as to provision required at the date of the hearing).

5 Inheritance (Provision for Family and Dependants) Act 1975 s 2(4).

6 For the meaning of 'property' see PARA 682 note 2 ante.

7 For the meaning of 'net estate' see PARA 682 ante.

8 Inheritance (Provision for Family and Dependants) Act 1975 s 2(4)(a). An adjournment will sometimes be necessary to enable such beneficiaries to be separately represented and heard. The applicant's property cannot be settled: *Malone v Harrison* [1979] 1 WLR 1353.

9 For the meaning of 'will' see PARA 666 note 8 ante.

10 As to the law relating to intestacy see PARA 583 et seq ante.

11 Inheritance (Provision for Family and Dependants) Act 1975 s 2(4)(b). The court's discretion is unfettered: see note 3 supra. See also *Re Mason, Mason v Mason* (1975) 5 Fam Law 124; *Rajabally v Rajabally* [1987] 2 FLR 390, CA.

12 Ie an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2: see s 2(4)(c).

13 Ibid s 2(4)(c). See *Re Haig, Powers v Haig* [1979] LS Gaz R 476.

14 As to interim orders see the Inheritance (Provision for Family and Dependants) Act 1975 s 5; and PARA 703 post.

15 Ibid s 5(4).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(5) ORDER FOR FINANCIAL PROVISION/693. Effect of order.

693. Effect of order.

Where an order is made under the Inheritance (Provision for Family and Dependants) Act 1975¹ then for all purposes, including the purposes of the enactments relating to inheritance tax², the will³ or the law relating to intestacy⁴, or both, as the case may be, have effect and are deemed to have had effect as from the deceased's death subject to the provisions of the order⁵.

Any such order, or any interim order⁶, in favour of (1) an applicant who was the former husband or former wife⁷ of the deceased⁸; or (2) an applicant who was the husband or wife⁹ of the deceased in a case where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing¹⁰, in so far as it provides for the making of periodical payments, ceases to have effect on the applicant's remarriage¹¹ except in relation to any arrears due under the order on the date of the remarriage¹².

1 Ie under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 ante); see s 19(1).

2 See INHERITANCE TAXATION.

3 For the meaning of 'will' see PARA 666 note 8 ante.

4 As to the law relating to intestacy see PARA 583 et seq ante.

- 5 Inheritance (Provision for Family and Dependents) Act 1975 s 19(1).
- 6 le any order under ibid s 5 (see PARA 703 post): see s 9(2).
- 7 For the meanings of 'former wife' and 'former husband' see PARA 667 note 5 ante. As to husbands and wives under void marriages see PARA 667 note 5 ante.
- 8 Inheritance (Provision for Family and Dependents) Act 1975 s 19(2)(a).
- 9 As to the meanings of 'husband' and 'wife' see PARA 667 note 4 ante.
- 10 Inheritance (Provision for Family and Dependents) Act 1975 s 19(2)(b).
- 11 As to remarriage see PARA 667 note 5 ante.
- 12 Inheritance (Provision for Family and Dependents) Act 1975 s 19(2).

UPDATE

693 Effect of order

TEXT AND NOTES 6-12--Inheritance (Provision for Family and Dependents) Act 1975 s 19(2) amended: Civil Partnership Act 2004 Sch 4 para 26.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(5) ORDER FOR FINANCIAL PROVISION/694. Variation, discharge, suspension and revival of orders.

694. Variation, discharge, suspension and revival of orders.

Where the court¹ has made an original order² for the making of periodical payments to any person ('the original recipient'³) it has power, on an application⁴, by order to vary or discharge the original order or to suspend any provision of it temporarily and to revive the operation of any provision so suspended⁵. Any order made on an application for the variation of the original order may⁶:

- (1) provide for the making out of any relevant property⁷ of such periodical payments and for such term as may be specified in the order⁸ to any person who has applied, or would but for the statutory time limit⁹ be entitled to apply, for an order for financial provision¹⁰ (whether or not, in the case of any application, an order was made in favour of the applicant)¹¹;
- (2) provide for the payment out of any relevant property of a lump sum of such amount as may be so specified to the original recipient or to any such person as is mentioned in head (1) above¹²; or
- (3) provide for the transfer of the relevant property, or such part of it as may be so specified, to the original recipient or to any such person as is so mentioned¹³.

Where the original order provides that any periodical payments payable under it to the original recipient are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, then, if, before the end of the period of six months from the date of the occurrence of that event or of the expiration of that period, an application is made for an order under this provision, the court has power to make any order which it would have had power to make if the

application had been made before that date (whether in favour of the original recipient or any such person as is mentioned in head (1) above, and whether having effect from that date or from such later date as the court may specify)¹⁴.

In exercising these powers the court must have regard to all the circumstances of the case, including any change in any of the matters to which it was required to have regard when making the order to which the application relates¹⁵. Where the court makes an order under this provision it may give such consequential directions as it thinks necessary or expedient having regard to the provisions of the order¹⁶.

1 For the meaning of 'court' see PARA 666 note 6 ante.

2 Ie under the Inheritance (Provision for Family and Dependants) Act 1975 s 2(1)(a) (see PARA 691 ante): see s 6(1). Any reference in s 6 to the original order includes a reference to an order made under s 6: s 6(4).

3 Any reference in *ibid* s 6 to the original recipient includes a reference to any person to whom periodical payments are required to be made by virtue of an order under s 6: s 6(4).

4 The application may be made by: (1) any person who by virtue of *ibid* s 1(1) (see PARA 667 ante) has applied, or would but for s 4 (see PARA 697 post) be entitled to apply for an order under s 2 (see PARAS 691-692 ante); (2) the deceased's personal representatives; (3) the trustees of any relevant property (see note 7 *infra*); and (4) any beneficiary of the deceased's estate: s 6(5). For the meaning of 'beneficiary' see PARA 672 note 6 ante. An application should be made by the issue of an application notice in accordance with CPR Pt 23: CPR Sch 1 RSC Ord 99 r 9. As to the CPR see PARA 37 note 3 ante.

5 Inheritance (Provision for Family and Dependants) Act 1975 s 6(1), which is expressed to be subject to the provisions of the Act. On an application under s 6 the court may not make any such order as is mentioned in s 2(1)(d), (e) or (f) (see PARA 691 ante), s 9 (see PARA 685 ante), s 10 (see PARAS 686-687 ante) or s 11 (see PARA 688 ante): s 6(9).

6 *Ibid* s 6(2), which is expressed to be without prejudice to the generality of s 6(1).

7 An order under *ibid* s 6 may only affect relevant property, namely: (1) property the income of which is at the date of the order applicable wholly or in part for the making of periodical payments to any person who has applied for an order under the Inheritance (Provision for Family and Dependants) Act 1975; or (2) in the case of an application under s 6(3) in respect of payments which have ceased to be payable on the occurrence of an event or the expiration of a period, property the income of which was so applicable immediately before the occurrence of that event or the expiration of that period, as the case may be: s 6(6).

A right to occupy a property for life is not relevant property: *Frickler v Personal Representatives of Frickler* (1982) 3 FLR 228. Where needs are likely to be greater in the future the practice is not to make a nominal award but to stand the application over: *Re Bateman, Bateman v Simpson* (1941) 85 Sol Jo 454; *Re Franks, Franks v Franks* [1948] Ch 62, [1947] 2 All ER 638.

8 In relation to an order which provides for the making of periodical payments which are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, the power to vary an order includes power to provide for the making of periodical payments after the expiration of that period or the occurrence of that event: Inheritance (Provision for Family and Dependants) Act 1975 s 6(10).

9 Ie but for *ibid* s 4 (see PARA 697 post): see s 6(2)(a). See also *Re Dorgan, Dorgan v Polley* [1948] Ch 366, [1948] 1 All ER 723.

10 Ie under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 ante): see s 6(2)(a).

11 *Ibid* s 6(2)(a).

12 *Ibid* s 6(2)(b). Such an order for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order: s 7(1). In such a case the court has power, on an application by the person to whom the lump sum is payable, by the deceased's personal representatives or by the trustees of the property out of which the lump sum is payable, to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable: s 7(2).

13 *Ibid* s 6(2)(c).

14 Ibid s 6(3).

15 Ibid s 6(7). An accumulation of capital by an applicant may amount to a change of circumstances but need not lead to a variation: *Re Gale, Gale v Gale* [1966] Ch 236, [1966] 1 All ER 945, CA, per Russell LJ.

16 Inheritance (Provision for Family and Dependants) Act 1975 s 6(8).

UPDATE

694 Variation, discharge, suspension and revival of orders

NOTE 4--CPR Sch 1 RSC Ord 99 r 9 revoked: SI 2002/2058.

TEXT AND NOTES 8, 14--Inheritance (Provision for Family and Dependants) Act 1975 s 6(3), (10) amended: Civil Partnership Act 2004 Sch 4 para 19.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(5) ORDER FOR FINANCIAL PROVISION/695. Variation and discharge of orders made in divorce proceedings.

695. Variation and discharge of orders made in divorce proceedings.

Where an application for an order for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975¹ is made to the court² by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order made under the Matrimonial Causes Act 1973³, then, in the proceedings on that application, the court has power, on an application made by that person or by the deceased's personal representative, to vary or discharge that periodical payments order or to revive the operation of any provision of it which has been suspended⁴. These powers in relation to an order are exercisable also in relation to any instrument executed in pursuance of the order⁵.

In exercising these powers the court must have regard to all the circumstances of the case, including any interim order⁶ or order for financial provision⁷ which the court proposes to make, and any change (whether resulting from the death of the deceased or otherwise) in any of the matters to which the court was required to have regard when making the secured periodical payments order⁸.

1 Ie under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 ante); see s 16(1).

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 As to orders under the Matrimonial Causes Act 1973 see PARA 678 note 11 ante.

4 Inheritance (Provision for Family and Dependants) Act 1975 s 16(1). Secured periodical payments orders are suspended under the Matrimonial Causes Act 1973 s 31 (as amended): see the Inheritance (Provision for Family and Dependants) Act 1975 s 16(1). As to the availability of the court's powers under the Inheritance (Provision for Family and Dependants) Act 1975 in applications under the Matrimonial Causes Act 1973 ss 31, 36 (both as amended) see the Inheritance (Provision for Family and Dependants) Act 1975 s 18.

5 Ibid s 16(3).

6 Ie under ibid s 5 (see PARA 703 post): see s 16(2).

7 le under *ibid* s 2 (see PARAS 691-692 ante): see s 16(2).

8 *Ibid* s 16(2).

UPDATE

695 Variation and discharge of orders made in divorce proceedings

TEXT AND NOTE 4--Inheritance (Provision for Family and Dependants) Act 1975 s 16(1) amended: Civil Partnership Act 2004 Sch 4 para 23. See further 1975 Act s 18A (added by Civil Partnership Act 2004 Sch 4 para 25) (availability of court's powers under the 1975 Act in applications under the Civil Partnership Act 2004 Sch 5 paras 60, 73).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(5) ORDER FOR FINANCIAL PROVISION/696. Variation and revocation of maintenance agreements.

696. Variation and revocation of maintenance agreements.

Where an application for an order for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975¹ is made to the court² by any person who was at the time of the death of the deceased entitled to payments from the deceased under a maintenance agreement³ which provided for the continuation of payments under the agreement after the death of the deceased, then, in the proceedings on that application, the court has power, on an application by that person or by the deceased's personal representative, to vary or revoke that agreement⁴. In exercising these powers the court must have regard to all the circumstances of the case, including any interim order⁵ or order for financial provision⁶ which the court proposes to make, and any change (whether resulting from the death of the deceased or otherwise) in any of the circumstances in the light of which the agreement was made⁷.

If a maintenance agreement is varied by the court under this provision the like consequences ensue as if the variation had been made immediately before the death of the deceased by agreement between the parties and for valuable consideration⁸.

1 le under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (see PARAS 691-692 ante): see s 17(1).

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 In relation to a deceased person, 'maintenance agreement' means any agreement made, whether in writing or not, and whenever made, by the deceased with any person with whom he entered into a marriage, being an agreement which contained provisions governing the rights and liabilities towards one another when living separately of the parties to that marriage (whether or not the marriage has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the deceased or a person who was treated by the deceased as a child of the family in relation to that marriage: Inheritance (Provision for Family and Dependants) Act 1975 s 17(4). For the meaning of 'child' see PARA 667 note 7 ante; and for the meaning of 'property' see PARA 682 note 2 ante.

4 *Ibid* s 17(1).

5 le under *ibid* s 5 (see PARA 703 post): see s 17(2).

6 le under *ibid* s 2 (see PARAS 691-692 ante): see s 17(2).

7 Ibid s 17(2).

8 Ibid s 17(3). For the meaning of 'valuable consideration' see PARA 667 note 11 ante.

UPDATE

696 Variation and revocation of maintenance agreements

NOTE 3--Inheritance (Provision for Family and Dependents) Act 1975 s 17(4) amended: Civil Partnership Act 2004 Sch 4 para 24.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/697. Time for application.

(6) PROCEDURE

697. Time for application.

An application for an order under the Inheritance (Provision for Family and Dependents) Act 1975¹ must not, except with the permission of the court², be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out³. In considering for the purposes of the Act when representation with respect to the estate of a deceased person was first taken out, a grant limited to settled land or to trust property must be left out of account, and a grant limited to real estate or to personal estate must be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time⁴.

An application should not be made before a grant of probate has been obtained and may be struck out as premature⁵ but if a grant is obtained before the hearing and no objection on the ground of irregularity has been made before that time the application will be heard⁶.

The provisions of the Act do not render the personal representative of a deceased person liable for having distributed any part of the estate, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that he ought to have taken into account the possibility that: (1) the court might permit the making of an application for an order under the Act after the end of that period⁷; or (2) where such an order has been made, the court might exercise in relation to it its powers⁸ to vary, discharge, suspend or revive it⁹. This provision does not, however, prejudice any power to recover, by reason of the making of an order under the Act, any part of the estate so distributed¹⁰.

1 le an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 ante); see s 4.

2 For the meaning of 'court' see PARA 666 note 6 ante. As to applications for an extension of time see PARA 698 post.

3 Inheritance (Provision for Family and Dependents) Act 1975 s 4. There is no distinction between a person under a disability and any other claimant so time runs against all claimants but disability is a material factor to be considered on an application for an extension of time: *Re C*[1995] 2 FLR 24 at 28 per Wilson J; *Re Trott, Trott v Miles*[1958] 2 All ER 296, [1958] 1 WLR 604. No further period is initiated if a grant is obtained later in solemn form: *Re Miller, Miller v de Courcey*[1968] 3 All ER 844, [1969] 1 WLR 583. Where a grant is revoked and letters of administration are granted (and vice versa), time runs from the date of the second grant: *Re Freeman*[1984]

3 All ER 906, [1984] 1 WLR 1419; *Re Bidie, Bidie v General Accident Fire and Life Assurance Corpn Ltd*[1949] Ch 121, [1948] 2 All ER 995, CA. A grant limited to solicitors for the purpose of issuing a claim for negligence on behalf of the deceased's estate is not the first taking out of a grant of representation for these purposes: *Re Johnson* [1987] CLY 3882.

4 Inheritance (Provision for Family and Dependents) Act 1975 s 23. A grant limited to pursuing a negligence claim in respect of a road accident in which the deceased had died was not a grant of representation for these purposes: *Re Johnson* [1987] CLY 3882. Where a grant in solemn form confirms a grant in common form, time runs from the date of the grant in common form: *Re Miller, Miller v de Courcey*[1968] 3 All ER 844, [1969] 1 WLR 583. Where a grant is subsequently revoked time only runs from the later valid grant: *Re Freeman*[1984] 3 All ER 906, [1984] 1 WLR 1419; *Re Bidie, Bidie v General Accident Fire and Life Assurance Corpn Ltd*[1949] Ch 121, [1948] 2 All ER 995, CA.

5 *Re McBroom*[1992] 2 FLR 49 (the presence of some person entitled to administer the estate of the deceased was necessary). Cf *Re Searle, Searle v Siems*[1949] Ch 73, [1948] 2 All ER 426 (a decision under the Inheritance (Family Provision) Act 1938 (repealed), where a grant of representation had been obtained before trial, the objection was merely procedural and could not be taken at trial). The position is unsatisfactory: *Re Searle, Searle v Siems* supra was not cited in *Re McBroom* supra. See also *Re Dawkins, Dawkins v Judd*[1986] 2 FLR 360 (final order made before grant of representation taken out).

6 *Re Searle, Searle v Siems*[1949] Ch 73, [1948] 2 All ER 426.

7 Inheritance (Provision for Family and Dependents) Act 1975 s 20(1)(a).

8 Ie the court's powers under ibid s 6 (see PARA 694 ante): see s 20(1)(b).

9 Ibid s 20(1)(b).

10 Ibid s 20(1).

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependents) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependents) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependents) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14, 57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5).

For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/698. Application for extension of time.

698. Application for extension of time.

The court has an unfettered discretion to permit an application to be made after the end of the period of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out¹. The discretion is to be exercised judicially² and the onus lies on the claimant to make out a substantial case for it being just and proper for the court to exercise its discretion to extend the time³. On the hearing of an application it is material to consider: (1) how promptly and in what circumstances the claimant sought an extension of time (and how promptly the claimant warned the potential defendants of the proposed application)⁴; (2) whether negotiations commenced within the time limit⁵; (3) whether the estate has been distributed before a claim is made or notified⁶; and (4) whether a refusal to extend time would leave the claimant without redress against anybody⁷.

1 *Re Salmon, Coard v National Westminster Bank Ltd* [1981] Ch 167 at 175, [1980] 3 All ER 532 at 537 per Megarry V-C. An application for an extension of time should be expressly asked for in the claim form and the supporting witness statement or affidavit should set out the reasons why an extension should be granted: see *Practice Direction* [1976] 2 All ER 447, [1976] 1 WLR 418. The application is made when the claim form is issued: see *Re Chittenden, Chittenden v Doe* [1970] 3 All ER 562, [1970] 1 WLR 1618. The application should be the first item of relief claimed: *Re Greaves, Greaves v Greaves* [1954] 2 All ER 109, [1954] 1 WLR 760. Where there is more than one applicant each applicant should apply in time or make an application for an extension of time: *Re Trott, Trott v Miles* [1958] 2 All ER 296, [1958] 1 WLR 604.

2 *Re Salmon, Coard v National Westminster Bank Ltd* [1981] Ch 167 at 175, [1980] 3 All ER 532 at 537 per Megarry V-C; *Re Ruttie, Ruttie v Saul* [1969] 3 All ER 1633, [1970] 1 WLR 89.

3 *Re Salmon, Coard v National Westminster Bank Ltd* [1981] Ch 167 at 175, [1980] 3 All ER 532 at 537 per Megarry V-C; *Stock v Brown* [1994] 1 FLR 840; *Re Gonin* [1979] Ch 16, sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720; *Re C* [1995] 2 FLR 24.

4 *Re Salmon, Coard v National Westminster Bank Ltd* [1981] Ch 167 at 175, [1980] 3 All ER 532 at 537 per Megarry V-C. Late applications have been allowed in *Re Salmon, Coard v National Westminster Bank Ltd* supra (five and a half months out of time); *Stock v Brown* [1994] 1 FLR 840 (five and a half years out of time); *Re C* [1995] 2 FLR 24 (18 months out of time); *Re Abram* [1996] 2 FLR 379; but refused in *Re Gonin* [1979] Ch 16, sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720 (two and a half years out of time).

5 *Re Salmon, Coard v National Westminster Bank Ltd* [1981] Ch 167 at 175, [1980] 3 All ER 532 at 537 per Megarry V-C; *Re Ruttie, Ruttie v Saul* [1969] 3 All ER 1633, [1970] 1 WLR 89; *Re McNare, McNare v McNare* [1964] 3 All ER 373, [1964] 1 WLR 1255. An extension was granted where the delay was caused by the expectation that the executors would commence proceedings for the construction of the will and that the result of those proceedings might be materially to affect the provision to be made: *Re Bone, Bone v Midland Bank Ltd* [1955] 2 All ER 555, [1955] 1 WLR 703.

6 *Re Salmon, Coard v National Westminster Bank Ltd* [1981] Ch 167 at 175-176, [1980] 3 All ER 532 at 537-538 per Megarry V-C; *Stock v Brown* [1994] 1 FLR 840. Distribution alone may not defeat an application if the beneficiaries have not changed their position: *Re Salmon, Coard v National Westminster Bank Ltd* supra at 176 and 538 per Megarry V-C; *Re Longley, Longley and Longley v Longley* [1981] CLY 2885.

7 *Re Salmon, Coard v National Westminster Bank Ltd* [1981] Ch 167 at 176, [1980] 3 All ER 532 at 538 per Megarry V-C; *Re Gonin* [1979] Ch 16, sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720; *Re C* [1995] 2 FLR 24. See also *Re B* [2000] 1 All ER 665, CA. A prospective claim in negligence against the claimant's own solicitors is not to be totally ignored but is not a factor of any great importance and does not counterbalance other important factors: *Adams v Adams* (12 November 1993, unreported), CA. A solicitor's ignorance of the

limited time in which application might be made was not a circumstance which would justify an extension: *Re Greaves, Greaves v Greaves* [1954] 2 All ER 109, [1954] 1 WLR 760.

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependants) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependants) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependants) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14, 57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5). For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

698 Application for extension of time

NOTE 4--See also *Nesheim v Kosa* [2006] EWHC 2710 (Ch), [2007] WTLR 149.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/699. Mode of application.

699. Mode of application.

Both the High Court and the county court have unlimited jurisdiction in relation to applications under the Inheritance (Provision for Family and Dependants) Act 1975¹. Furthermore, proceedings may be heard and disposed of by a master or district judge². Proceedings are begun by the issue of a claim form³, appropriately entitled⁴. There must be filed with the court a supporting witness statement or affidavit by the applicant, exhibiting an official copy of the

grant of representation to the deceased's estate and of every testamentary document admitted to proof, and a copy of the witness statement or affidavit must be served on every defendant with the claim form⁵. In the High Court proceedings may be assigned to the Chancery Division or the Family Division⁶.

1 See the County Courts Act 1984 s 25 (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule) (see COURTS); CPR Sch 1 RSC Ord 99. Order 99 applies to proceedings both in the High Court and the county court: CPR Sch 1 RSC Ord 99 r A1. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 2.4; *Practice Direction-Allocation of cases to Levels of Judiciary* (1999) PD 2B; *Practice Direction* [1999] 3 All ER 192.

3 CPR Sch 1 RSC Ord 99 r 3(1). A claim form should be issued under CPR Pt 8: see *Practice Direction-How to make Claims in the Schedule Rules and other Claims* (1999) PD 8B.

4 Only the parties should be referred to in the title, the Inheritance (Provision for Family and Dependents) Act 1975 should be referred to in the body of the claim form: *Chancery Division Practice Direction-Title to Proceedings* (1999) CDPD 11.

5 CPR Sch 1 RSC Ord 99 r 3(3). The witness statement or affidavit should set out the grounds of any application (see PARA 698 ante) to enlarge the time for applying: *Practice Direction* [1976] 2 All ER 447, [1976] 1 WLR 418.

6 CPR Sch 1 RSC Ord 99 r 2. Transfer between these divisions under CPR 30.5, may be appropriate where there have been previous relevant proceedings in the other division, or where the application involves the taking of complicated accounts (for which special facilities exist in the Chancery Division), or where sufficient grounds can be shown by the parties: *Practice Direction* [1976] 2 All ER 447, [1976] 1 WLR 418. Proceedings begun in the Chancery Division must be issued either out of Chancery Chambers or out of a district registry: see *Chancery Guide* (1999) Ch 4.

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependents) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependents) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependents) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14, 57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-

6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5). For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

699 Mode of application

NOTE 2--*Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B amended.

NOTE 3--*Practice Direction--How to make Claims in the Schedule Rules and other Claims* (1999) PD 8B amended.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/700. Parties.

700. Parties.

On an application for financial provision the person applying must be the claimant and he should join the personal representatives as necessary defendants¹ together with the beneficiaries² most likely to be affected³. Without prejudice to its general powers⁴ the court may at any stage of the proceedings direct that any person be added as a party or that notice of the proceedings be served on him⁵. Beneficiaries who have the same interest and unascertained persons may be the subject of a representation order⁶.

If the application is made jointly by two or more applicants and the claim form is accordingly issued by one solicitor on behalf of them all they may, if they have conflicting interests, appear on any hearing of the claim separately; and where at any stage it appears to the court that one of the applicants is not but ought to be separately represented it may adjourn the proceedings until he is⁷.

1 *Re Lidington, Lidington v Thomas* [1940] WN 279; *Re Blight* (1946) 96 LJ 233. If the claimant is a personal representative he should not be a defendant: *Payne v Little* (1851) 13 Beav 114; *Lewis v Nobbs* (1878) 8 ChD 591.

2 For the meaning of 'beneficiary' under the Inheritance (Provision for Family and Dependents) Act 1975 see PARA 672 note 6 ante. The term is no longer confined to persons benefiting under the will or intestacy.

3 This will normally mean the residuary legatees and/or any major specific legatees or devisees. The plaintiff may of course be sole executor.

4 Ie under CPR Pt 19; *Practice Direction-Addition and Substitution of Parties* (1999) PD 19. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

5 CPR Sch 1 RSC Ord 99 r 4(1).

6 CPR Sch 1 RSC Ord 15 r 13(2)(c); CPR Sch 1 RSC Ord 99 r 4(2) (reversing, in effect, *Re Knowles, Knowles v Birtwell* [1966] Ch 386, [1966] 2 All ER 480n).

7 CPR Sch 1 RSC Ord 99 r 6. In such a case one of the applicants would strictly have to be made a defendant at that stage.

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependants) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependants) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependants) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14, 57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5). For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

700 Parties

TEXT AND NOTES 5-7--CPR Sch 1 RSC Ord 15 r 13 revoked: SI 2000/221. CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/701. Transfers between courts.

701. Transfers between courts.

An application under the Inheritance (Provision for Family and Dependants) Act 1975 which is pending in either the High Court or the county court may be transferred between county courts, within the High Court¹ and between the High Court and the county courts².

Where proceedings have been commenced in the High Court, the High Court may order their transfer to a county court³ or order proceedings in the Royal Courts of Justice or a district registry, or any part of such proceedings, to be transferred from the Royal Courts of Justice to a district registry or from a district registry to the Royal Courts of Justice or to another district registry⁴.

Where proceedings have been commenced in a county court, the county court may order proceedings before that court or any part of them, to be transferred to another county court⁵. If proceedings have been started in the wrong county court, a judge of the county court may order that the proceedings be transferred to the county court in which they ought to have been started, continue in the county court in which they have been started or be struck out⁶. Proceedings commenced in the county court can be transferred to the High Court by either the High Court⁷ or the county court⁸.

An order made before the transfer of proceedings is not affected by the order to transfer⁹.

1 See CPR Pt 30; and CIVIL PROCEDURE; COURTS. As to the CPR see PARA 37 note 3 ante.

2 See the County Courts Act 1984 ss 40(2) (as substituted), 41(1), 42(2) (as substituted) (see COURTS); CPR 30.3.

3 See the County Courts Act 1984 s 40 (as substituted); and COURTS. The court is to have regard to the financial value of the claim and the amount in dispute, if different; whether it would be more convenient or fair for hearings (including the trial) to be held in some other court; the availability of a judge specialising in the type of claim in question; whether the facts, legal issues, remedies or procedures involved are simple or complex; the importance of the outcome of the claim to the public in general; and the facilities available at the court where the claim is being dealt with and whether they may be inadequate because of any disabilities of a party or potential witness: CPR 30.3(1), (2).

4 CPR 30.2(4). As to the matters to which the court is to have regard see note 3 supra. A district registry may order proceedings before it for the detailed assessment of costs to be transferred to another district registry if it is satisfied that the proceedings could be more conveniently or fairly taken in that other district registry: CPR 30.2(5). The application should be made to the district registry in which the claim is proceeding: CPR 30.2(6).

5 CPR 30.2(1). As to the matters to which the court is to have regard see note 3 supra. A county court may order proceedings before it for the detailed assessment of costs or for the enforcement of a judgment or order to be transferred to another county court if it is satisfied that the proceedings could be more conveniently or fairly taken in that other county court: CPR 30.2(1)(b). The application should be made to the county court in which the claim is proceeding: CPR 30.2(3).

6 CPR 30.2(2). As to the matters to which the court is to have regard see note 3 supra. The application should be made to the county court in which the claim is proceeding: CPR 30.2(3).

7 See the County Courts Act 1984 s 41 (as amended); CPR 30.3. As to the matters to which the court is to have regard see note 3 supra.

8 See the County Courts Act 1984 s 42 (as substituted); CPR 30.3. As to the matters to which the court is to have regard see note 3 supra.

9 CPR 30.4(2).

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependants) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependants) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependants) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14,

57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5). For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

701 Transfers between courts

NOTE 3--The court must also now have regard to whether the making of a declaration of incompatibility under the Human Rights Act 1998 s 4 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 104A.2) has arisen or may arise: CPR 30.3(2) (amended by SI 2000/2092).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/702. Procedure subsequent to application.

702. Procedure subsequent to application.

In both the High Court and the county court¹ a defendant who is a personal representative must and any other defendant may file with the court a witness statement or affidavit in answer to the application², and every defendant who lodges a witness statement or affidavit must serve a copy on the claimant and on every defendant who is not represented by the same solicitor³. The witness statement or affidavit must be lodged or filed within 21 days after service of the claim form, inclusive of the day of service⁴. The witness statement or affidavit in answer by a personal representative must state, to the best of his ability: (1) full particulars of the value of the deceased's net estate⁵; (2) the person or classes of persons beneficially interested in the estate, giving the names and (in the case of those who are not already parties) the addresses of all living beneficiaries and the value of their interests so far as ascertained⁶; (3) if it be the case, that any living beneficiary (naming him) is a child or patient⁷; and (4) any facts known to the representative which might affect the exercise of the court's statutory powers⁸. Unless he is beneficially interested, the personal representative should adopt an impartial and non-contentious stance.

The rules as to case management⁹, disclosure¹⁰, evidence¹¹ and offers¹² apply to applications under the Inheritance (Provision for Family and Dependents) Act 1975 in the same way as to other applications. Where there is a dispute as to fact oral evidence will normally be directed so that cross-examination is likely. The evidence admissible is not limited to legal evidence in the strict sense¹³, and may cover the deceased's state of mind¹⁴. The representatives must produce in court at the hearing the probate or letters of administration¹⁵.

A copy of the order must be sent to the principal registry of the Family Division for entry and filing, and a memorandum of the order must be indorsed on or permanently annexed to the probate or letters of administration under which the estate is being administered¹⁶.

Once an order has been made¹⁷ any subsequent application, whether by a party or by any other person, must be made by the issue of an application notice¹⁸.

1 See CPR Sch 1 RSC Ord 99 r A1. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 CPR Sch 1 RSC Ord 99 r 5(1).

3 CPR Sch 1 RSC Ord 99 r 5(3).

4 CPR Sch 1 RSC Ord 99 r 5(1).

5 CPR Sch 1 RSC Ord 99 r 5(2)(a). For the meaning of 'net estate' see PARA 682 ante; definition applied by CPR Sch 1 RSC Ord 99 r 5(2)(a). In practice it is often impossible to negotiate a compromise until the personal representatives have produced this evidence.

6 CPR Sch 1 RSC Ord 99 r 5(2)(b).

7 CPR Sch 1 RSC Ord 99 r 5(2)(c). 'Child' means a person under 18; and 'patient' means a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 402) is incapable of managing and administering his own affairs: CPR 21.1(2); definition applied by CPR Sch 1 RSC Ord 99 r 5(2)(c).

8 CPR Sch 1 RSC Ord 99 r 5(2)(d). The personal representative is not obliged to make inquiries and observations in order to ascertain or confirm other matters within the 21 days after service of the claim form; nor is he required to set out facts (possibly distasteful) which are not necessarily relevant at this stage; if they become relevant later he may lodge a further affidavit: see *Practice Direction* [1976] 2 All ER 447, [1976] 1 WLR 418.

9 See CPR Pts 3, 26.

10 See CPR Pt 31.

11 See CPR Pts 32-35. As to evidence generally see CIVIL PROCEDURE vol 11 (2009) PARA 749 et seq. See also CPR 8.5.

12 See CPR Pts 36, 37.

13 *Re Vrint, Vrint v Swain* [1940] Ch 920. Earlier wills are admissible.

14 An application under the Inheritance (Provision for Family and Dependents) Act 1975 cannot be used as an indirect way of challenging a will for want of testamentary capacity: *Re Blanch, Blanch v Honhold* [1967] 2 All ER 468, [1967] 1 WLR 987; *Williams v Johns* [1988] 2 FLR 475.

15 CPR Sch 1 RSC Ord 99 r 7. If the court makes an order the grant remains in the custody of the court until a copy of the order has been sent to the principal registry of the Family Division and a memorandum of the order has been indorsed on or permanently annexed to the grant: CPR Sch 1 RSC Ord 99 r 7; Inheritance (Provision for Family and Dependents) Act 1975 s 19(3) (see the text to note 16 infra).

16 Ibid s 19(3) (amended by the Administration of Justice Act 1982 s 52); CPR Sch 1 RSC Ord 99 r 7. This does not apply to an order made under the Inheritance (Provision for Family and Dependents) Act 1975 s 15(1) (as substituted) (see PARA 667 ante); s 19(3) (as so amended). In the case of proceedings in the Family Division the provisions of the Family Proceedings Rules relating to the drawing up and service of orders apply: CPR Sch 1 RSC Ord 99 r 10.

17 I.e. under the Inheritance (Provision for Family and Dependents) Act 1975 s 1 (as amended) (see PARAS 666-667 ante); see CPR Sch 1 RSC Ord 99 r 9.

18 CPR Sch 1 RSC Ord 99 r 9. As to application notices see CPR Pt 23.

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependents) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependents) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependents) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14, 57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5). For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

702 Procedure subsequent to application

TEXT AND NOTE 16--Inheritance (Provision for Family and Dependents) Act 1975 s 19(3) amended: Civil Partnership Act 2004 Sch 4 para 26.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/703. Interim orders.

703. Interim orders.

Where on an application for an order under the Inheritance (Provision for Family and Dependents) Act 1975¹ it appears to the court²: (1) that the applicant is in immediate need of financial assistance³, but it is not yet possible to determine what order, if any, should be made⁴; and (2) that property forming part of the net estate⁵ of the deceased is or can be made available to meet the applicant's needs⁶, the court has power to make an interim order. It may order that, subject to such conditions or restrictions, if any, as it may impose⁷ and to any further order, there is to be paid to the applicant out of the net estate of the deceased such sum or sums and (if more than one) at such intervals as the court thinks reasonable⁸; and it may order that, subject to the provisions of the Act, such payments are to be made until such

date as the court may specify, not being later than the date on which the court either makes an order on the original application or decides not to exercise its powers to make an order on that application⁹.

In determining what interim order, if any, should be made the court must, so far as the urgency of the case admits, have regard to the same matters as those to which it is required to have regard on the principal application¹⁰.

In both the High Court and the county court an application for an interim order need not be specifically made in the claim form¹¹.

Where the personal representative of a deceased person pays any sum directed by an interim order to be paid out of the deceased's net estate, he is not under any liability by reason of that estate not being sufficient to make the payment, unless at the time of making the payment he has reasonable cause to believe that the estate is not sufficient¹².

1 le under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see PARAS 691-692 ante): see s 5(1).

2 For the meaning of 'court' see PARA 666 note 6 ante.

3 Being forced to resort to borrowing and/or state assistance is clear evidence of immediate financial need: *Re Ralphs, Ralphs v District Bank Ltd* [1968] 3 All ER 285, [1968] 1 WLR 1522. See also *Barnsley v Ward* (18 January 1980) Lexis, Enggen Library, Cases File, CA (inability to make mortgage repayments evidence of immediate financial need).

4 Inheritance (Provision for Family and Dependents) Act 1975 s 5(1)(a).

5 For the meaning of 'property' see PARA 682 note 2 ante; and for the meaning of 'net estate' see PARA 682 ante.

6 Inheritance (Provision for Family and Dependents) Act 1975 s 5(1)(b). Property is available if it is readily saleable even if it might increase in value to the benefit of the estate if retained: *Barnsley v Ward* (18 January 1980) Lexis, Enggen Library, Cases File, CA. The income produced by a legacy bequeathed to the applicant is available: *Re Ralphs, Ralphs v District Bank Ltd* [1968] 3 All ER 285, [1968] 1 WLR 1522.

7 See eg *Re Ralphs, Ralphs v District Bank Ltd* [1968] 3 All ER 285, [1968] 1 WLR 1522 (amount paid under interim order to be brought into account against income of legacy); *Barnsley v Ward* (18 January 1980) Lexis, Enggen Library, Cases File, CA (condition requiring applicant to use best endeavours to obtain employment).

8 Inheritance (Provision for Family and Dependents) Act 1975 s 5(1). Section 2(2)-(4) (see PARAS 691-692 ante) applies in relation to an interim order as it applies in relation to an order under s 2: s 5(2). For examples of interim orders see *Re Besterman, Besterman v Grusin* [1984] Ch 458, [1984] 2 All ER 656, CA (capital sum of £75,000 and income of £11,500); *Stead v Stead* [1985] FLR 16, CA (periodical payments of £1,500 per annum backdated to date of death); *Re Ralphs, Ralphs v District Bank Ltd* [1968] 3 All ER 285, [1968] 1 WLR 1522 (income from legacy to applicant); *Barnsley v Ward* (18 January 1980) Lexis, Enggen Library, Cases File, CA (maintenance of £50 per week). An order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 may take account of payments made under an interim order: see s 5(4); and PARA 691 ante.

9 Ibid s 5(1). As to the effect of the order see s 19(2); and PARA 693 ante.

10 Ibid s 5(3). As to these matters see s 3 (as amended); and PARAS 671-681 ante.

11 An application for an interim order should be made in accordance with CPR Pt 23 supported by evidence of hardship and urgency. As to the CPR see PARA 37 note 3 ante.

12 Inheritance (Provision for Family and Dependents) Act 1975 s 20(2).

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependants) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependants) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependants) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14, 57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5). For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

703 Interim orders

NOTE 3--CPR 48.4(2), (3) substituted: SI 2001/4015.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/8. FAMILY PROVISION/(6) PROCEDURE/704. Costs.

704. Costs.

Subject to the terms of the Civil Procedure Rules¹, costs are in the discretion of the court². Personal representatives are entitled to have their costs paid out of the estate on the indemnity basis³. In all other cases, as in other forms of contested litigation, the costs of other parties generally follow the event⁴. Where an offer to settle is made⁵ which is close to the award finally made an applicant may not be entitled to all of his costs⁶. Applications and appeals in small estates are discouraged, often by the imposition of adverse costs orders against the claimant in such cases⁷.

1 See CPR Pts 43-46. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 44.3.

3 See CPR 48.4(2), (3). The costs of the obligatory witness statement or affidavit in answer should always come out of the estate. See also *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220; and the costs order in *Espinosa v Bourke* [1999] 1 FLR 747, CA, in which the unsuccessful respondent's costs were paid out of the estate.

4 See eg *Millward v Shenton* [1972] 2 All ER 1025, [1972] 1 WLR 711, CA. As in other cases, costs will not necessarily follow the event where there is an interesting point of law involved or the interests of a person under a disability are involved: *Cameron v Treasury Solicitor* [1996] 2 FLR 716, CA; *Re Watkins, Hayward v Chatterton* [1949] 1 All ER 695.

5 le under CPR Pt 36.

6 *Graham v Murphy* [1997] 1 FLR 860 (only one third of the successful applicant's costs met out of the estate).

UPDATE

697-704 Procedure

CPR Sch 1 RSC Ord 99 revoked: SI 2002/2058. As to the procedure applicable to claims brought under the Inheritance (Provision for Family and Dependents) Act 1975 see now CPR 57.14-57.16 (added by SI 2002/2058). Proceedings in the High Court under the Inheritance (Provision for Family and Dependents) Act 1975 must be issued in either (1) the Chancery Division; or (2) the Family Division: CPR 57.14, 57.15(1). The CPR apply to proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 which are brought in the Family Division, except that the provisions of the Family Proceedings Rules 1991, SI 1991/1247, relating to the drawing up and service of orders apply instead of the provisions in CPR Pt 40 and its practice direction: CPR 57.14, 57.15(2). A claim under the Inheritance (Provision for Family and Dependents) Act 1975 s 1 must be made by issuing a claim form in accordance with CPR Pt 8: CPR 57.14, 57.16(1). CPR 8.3 (acknowledgment of service) and CPR 8.5 (filing and serving written evidence) apply as modified by CPR 57.16(3)-(5): CPR 57.16(2). The written evidence filed and served by the claimant with the claim form must have exhibited to it an official copy of (a) the grant of probate or letters of administration in respect of the deceased's estate; and (b) every testamentary document in respect of which probate or letters of administration were granted: CPR 57.16(3). Subject to CPR 57.16(4A), the time within which a defendant must file and serve (i) an acknowledgment of service; and (ii) any written evidence, is not more than 21 days after service of the claim form on him: CPR 57.16(4) (as so added; and amended by SI 2004/1306). If the claim form is served out of the jurisdiction under CPR 6.32 or CPR 6.33, the period for filing an acknowledgment of service and any written evidence is seven days longer than the relevant period specified in CPR 6.35 or the practice direction supplementing CPR 6.20-6.29: CPR 57.16(4A) (added by SI 2004/1306, amended by SI 2008/2178). A defendant who is a personal representative of the deceased must file and serve written evidence, which must include the information required by the practice direction: CPR 57.16(5). For the meaning of 'testamentary document' see PARA 279. For provision supplementing CPR 57.14-57.16 see *Practice Direction--Probate* PD 57 paras 15-18.

9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT

(1) ADMINISTRATION AND OTHER REMEDIES

705. Jurisdiction.

In the administration of estates and the execution of trusts (including the distribution of fully administered estates)¹ the Chancery Division of the High Court² exercises a supervisory jurisdiction under which a claim may be issued for the determination of any question or for any remedy which could be determined or granted, as the case may be, in an administration claim³ and a claim need not be made for the administration or execution under the direction of the court of the estate or trust in connection with which the question arises or the remedy is sought⁴.

County courts have concurrent jurisdiction with the High Court where the estate sought to be administered does not exceed in amount or value the county court limit⁵. Where the value exceeds that sum jurisdiction may be conferred on county courts by agreement in writing⁶. Subject to any provision requiring proceedings to be in a county court, the High Court may, on the application of any party or on the court's own motion⁷, order the transfer of any proceedings before it to a county court⁸.

1 As to the distinction between administration and distribution see PARA 525 ante. As to the distinction between executorship and trusteeship see PARA 568 ante.

2 As to the statutory assignment of these jurisdictions to the Chancery Division see the Supreme Court Act 1981 s 61, Sch 1 para 1(c), (d); and COURTS.

3 For these purposes, 'administration claim' means a claim for the administration under the direction of the court of the estate of a deceased person or for the execution under the direction of the court of a trust: CPR Sch 1 RSC Ord 85 r 1. As to the CPR see PARA 37 note 3 ante.

4 See CPR Sch 1 RSC Ord 85. See also PARAS 713-714 post.

5 See the County Courts Act 1984 s 23(a); and COURTS. As to the county court limit see PARA 275 note 3 ante.

6 See *ibid* s 24 (as amended); and COURTS.

7 See *ibid* s 40(3) (as substituted); and COURTS.

8 See *ibid* s 40(1), (2) (as substituted); CPR 30.2; and COURTS. Proceedings transferred under the County Courts Act 1984 s 40 (as amended) are to be transferred to such county court as the High Court considers appropriate, having taken into account the convenience of the parties and that of any other persons likely to be affected and the state of business in the courts concerned: County Courts Act 1984 s 40(4) (as substituted); and CIVIL PROCEDURE; COURTS. As to the matters to which the court is to have regard see CPR 30.3; and PARA 276 ante. See also *Chancery Guide*(1999) Ch 13.

UPDATE

705 Jurisdiction

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTES 3, 4--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058.

NOTE 8--CPR 30.3(2) amended: SI 2000/2092.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(1) ADMINISTRATION AND OTHER REMEDIES/706. Power of the High Court to substitute or remove personal representatives.

706. Power of the High Court to substitute or remove personal representatives.

Where an application relating to the estate of a deceased person is made to the High Court¹ by or on behalf of a personal representative of the deceased or a beneficiary² of the estate, the court may in its discretion³:

- (1) appoint a person (a 'substituted personal representative') to act as personal representative of the deceased in place of the existing personal representative or representatives or any of them⁴; or
- (2) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons⁵.

Where the court appoints a person to act as a substituted personal representative of a deceased person⁶, then if that person is appointed to act with an executor or executors, the appointment constitutes him executor as from the date of the appointment, except for the purpose of including him in any chain of representation⁷; and, in any other case, the appointment constitutes that person administrator as from the date of appointment⁸.

The court may authorise a person appointed as a substituted personal representative to charge remuneration for his services, on such terms as the court thinks fit, whether or not involving the submission of bills of costs for detailed assessment by the court⁹.

1 Ie under the Administration of Justice Act 1985 s 50(1). For revocation of a grant of probate or administration for the purpose of better administration of the estate see PARA 259 ante.

2 For these purposes, 'beneficiary', in relation to the estate of a deceased person, means a person who is beneficially interested in the estate under the will of the deceased person or under the law relating to intestacy: *ibid* s 50(5).

3 *Ibid* s 50(1).

4 *Ibid* s 50(1)(a).

5 *Ibid* s 50(1)(b). Where an application relating to the estate of a deceased person is made under s 50(1), the court may, if it thinks fit, proceed as if the application were, or included, an application for the appointment of a judicial trustee in relation to that estate under the Judicial Trustees Act 1896: Administration of Justice Act 1985 s 50(4). As to judicial trustees see TRUSTS vol 48 (2007 Reissue) PARA 757 et seq. As to the procedure governing an application under s 50 see CPR Sch 1 RSC Ord 93 r 20. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

6 *Ibid* s 50(2).

7 *Ibid* s 50(2)(a). As to the chain of representation see PARA 47 et seq ante.

8 *Ibid* s 50(2)(b).

9 *Ibid* s 50(3). Since the enactment of the CPR taxation is now known as assessment: see PARA 37 note 3 ante.

UPDATE

706 Power of the High Court to substitute or remove personal representatives

NOTE 5--CPR Sch 1 RSC Ord 93 r 20 revoked: SI 2001/1388. For the procedure relating to applications for the substitution or removal of personal representatives see now CPR 57.1, 57.13 (CPR Pt 57 added by SI 2001/1388; and amended by SI 2002/2058); and *Practice Direction--Probate* (2001) PD 57. Now, CPR 57.13 (Pt 57 added by SI 2001/1388) contains rules about claims and applications for substitution or removal of a personal representative: CPR 57.13(1) (as added). Claims under CPR 57.13 must be brought in the High Court and are assigned to the Chancery Division: CPR 57.13(2) (as added). Every personal representative of the estate must be joined as a party. CPR 57.13(3) (as added). *Practice Direction--Probate* PD 57 makes provision for lodging the grant of probate or letters of administration in a claim under CPR 57.13: CPR 57.13(4) (as added). See *Practice Direction--Probate* PD 57 paras 12-14. If substitution or removal of a personal representative is sought by application in existing proceedings, this rule applies with references to claims being read as if they referred to applications: CPR 57.13(5) (as added). The power to remove and replace a personal representative is not limited to cases of misconduct: *Re Steel; Angus v Emmott* [2010] EWHC 154 (Ch), [2010] WTLR 531, [2010] All ER (D) 70 (Feb) (animosity and distrust between personal representative caused difficulties in administration of estate).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(1) ADMINISTRATION AND OTHER REMEDIES/707. The Public Trustee.

707. The Public Trustee.

Provision is made for the administration of solvent small estates to be undertaken by the Public Trustee in place of the existing executor or administrator¹. Any person who in the opinion of the Public Trustee would be entitled to apply to the court² for an order for the administration by the court of an estate, the gross capital value of which is proved to the satisfaction of the Public Trustee to be less than £1,000³, may apply to the Public Trustee to administer the estate, and, where any such application is made and it appears to the Public Trustee that the persons beneficially entitled are persons of small means, the Public Trustee must administer the estate, unless he sees good reason for refusing to do so⁴.

1 See the Public Trustee Act 1906 s 2(1)(a), (4); and TRUSTS vol 48 (2007 Reissue) PARA 767. As to grants of administration to the Public Trustee see PARA 176 ante. As to the Public Trustee's fees see PARA 44 ante. As to the Public Trustee generally see TRUSTS vol 48 (2007 Reissue) PARA 766 et seq.

2 As to where proceedings have already been commenced see PARA 708 post.

3 The limit has been £1,000 since 1906. As a result of inflation this provision has ceased to have any practical utility. The Public Trustee may not accept the administration of any estate which he knows or believes to be insolvent: see the Public Trustee Act 1906 s 2(4); *Re Devereux, Toovey v Public Trustee* [1911] 2 Ch 545 at 549 per Eve J; and TRUSTS vol 48 (2007 Reissue) PARAS 767, 772. An estate which had been reduced by partial distribution from £1,200 to £500 at the date of the application was held to be a small estate: *Re Devereux, Toovey v Public Trustee* supra.

4 Public Trustee Act 1906 s 3(1). See also TRUSTS vol 48 (2007 Reissue) PARA 772. As to the effect of the Public Trustee undertaking administration see TRUSTS vol 48 (2007 Reissue) PARA 773. As to where a legal representative has not already been constituted see PARA 708 note 1 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(1) ADMINISTRATION AND OTHER REMEDIES/708. Administration by the Public Trustee.

708. Administration by the Public Trustee.

Where proceedings have been instituted in any court for the administration of an estate, and by reason of its small value the court considers that the estate can be more economically administered by the Public Trustee or that for any other reason it is expedient that it should be administered by the Public Trustee instead of by the court, the court may order that it be administered by him in like manner, subject to any special directions by the court, as if the administration of the estate had been undertaken by him upon an application to him for the purpose¹.

1 Public Trustee Act 1906 s 3(5). See also TRUSTS vol 48 (2007 Reissue) PARA 775. As to applications to the Public Trustee to administer the estate see PARA 707 ante. It seems that neither s 3(1) (see PARA 705 ante) nor s 3(5) can apply unless a legal personal representative has already been constituted, for this condition must be fulfilled before any proceedings can be instituted for the administration of an estate by the court: see *Dowdeswell v Dowdeswell* (1878) 9 ChD 294, CA; *Rowsell v Morris* (1873) LR 17 Eq 20. As to grants of administration to the Public Trustee see PARA 176 ante. For the power of a personal representative who has obtained a grant to transfer the administration of the estate to the Public Trustee see the Public Trustee Act 1906 s 6(2) (see TRUSTS vol 48 (2007 Reissue) PARA 771); and PARA 52 ante. As to the right to apply to the Public Trustee for an audit of a trust or estate see TRUSTS vol 48 (2007 Reissue) PARA 777.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(1) ADMINISTRATION AND OTHER REMEDIES/709. Commencing administration proceedings.

709. Commencing administration proceedings.

An administration claim¹ may be begun in any case where a grant of representation has already been obtained². A claim should be brought under the normal procedure³ where there is likely to be a substantial dispute of fact⁴. The alternative procedure for claims⁵ will be appropriate in cases where there is unlikely to be a substantial dispute of fact⁶.

Where no grant has been obtained it may be appropriate to adopt the normal procedure⁷. In any claim the court has jurisdiction to appoint a receiver⁸. Where there has been no grant of representation and a receiver is appointed in proceedings begun by the normal procedure the claimant must undertake, if required, to take a grant of administration himself, because a decree for administration by the court cannot be made unless a legal personal representative has been duly constituted⁹.

1 See *Re Fawsitt, Galland v Burton* (1885) 30 ChD 231, CA.

2 See *Connell v Dunne and Nugent* (1913) 47 ILT 136, CA, where the court refused to make an order for administration under the former originating summons procedure where there was no executor or trustee constituted under the will, but merely a constructive trustee. As to the jurisdiction of the court see PARAS 705 ante, 715 post. As to limitations on the jurisdiction of the Chancery masters see CPR Pt 2; *Practice Direction--*

Allocation of Cases to Levels of Judiciary (1999) PD 2B para 5.1; and PARA 725 post. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

3 le under CPR Pt 7.

4 See the text and note 6 infra.

5 le under CPR Pt 8.

6 CPR 8.1(2)(a). Under the former rules of procedure such proceedings had to be brought by writ if there was no dispute of fact: *Nutter v Holland* [1894] 3 Ch 408 at 410, CA, per Lopes LJ. See also *Re Powers, Lindsell v Phillips* (1885) 30 ChD 291 at 296, CA, per Lindley LJ; *Re Weall, Andrews v Weall* (1889) 37 WR 779 at 780; *Dowse v Gorton* [1891] AC 190 at 202, HL; *Re Chalmers, Chalmers v Chalmers* (1921) 65 Sol Jo 475; *Re Sutcliffe, Jackman v Sutcliffe* [1942] Ch 453, [1942] 2 All ER 296; *Re Ellis, Kelson v Ellis* (1888) 59 LT 924; *Re Garnett, Gandy v Macaulay* (1885) 31 ChD 1 at 12, CA, per Cotton LJ. It is submitted that similar cases should be brought under CPR Pt 7. See, however, PARA 37 note 3 ante.

7 See note 3 supra. Under the former rules of procedure such proceedings had to be commenced by writ: *Re Sutcliffe, Jackman v Sutcliffe* [1942] Ch 453, [1942] 2 All ER 296.

8 CPR Sch 1 RSC Ord 30. See also *Re Francke, Drake & Co v Francke* (1888) 58 LT 305; cf *Re Dawson, Clarke v Dawson* (1906) 75 LJ Ch 201 (appointment of receiver in creditor's administration action of rents and profits of real estate of an intestate, who had died before the Land Transfer Act 1897 came into operation, the personal estate having been administered and there being no personal representative before the court). As to the appointment of receivers by the court see PARA 218 ante; and RECEIVERS vol 39(2) (Reissue) PARA 309 et seq.

9 *Re Sutcliffe, Jackman v Sutcliffe* [1942] Ch 453, [1942] 2 All ER 296.

UPDATE

709 Commencing administration proceedings

NOTE 5--CPR Pt 8 amended: SI 2000/221, SI 2000/1317, SI 2001/256.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(1) ADMINISTRATION AND OTHER REMEDIES/710. Service of process.

710. Service of process.

Where a claim form is issued all the executors or administrators of the estate or trustees of the trust, as the case may be, must be made parties to the proceedings¹. Where it is issued by an executor or administrator it must, generally speaking, be served upon such persons having a beneficial interest in or claim against the estate as the claimant thinks fit, having regard to the nature of the remedy claimed in the proceedings².

¹ See CPR Sch 1 RSC Ord 85 r 3(1); and PARA 717 post. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

² See CPR Sch 1 RSC Ord 85 r 3(2). As to where, in proceedings under a judgment or order, a claim in respect of a debt or other liability is made against the estate by a person not a party to the proceedings see PARA 717 post.

UPDATE

710 Service of process

TEXT AND NOTES--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(1) ADMINISTRATION AND OTHER REMEDIES/711. Service out of jurisdiction.

711. Service out of jurisdiction.

Service out of the jurisdiction of a claim form or notice of a claim form is permissible with the permission of the court if the claim is for the administration of the estate of a person who died domiciled within the jurisdiction or for any remedy which might be obtained in any such action¹. Where one of several personal representatives of a person who died domiciled out of the jurisdiction has in a claim properly brought against him been duly served within the jurisdiction, service out of the jurisdiction may be allowed on the other personal representatives². Where permission is sought to serve the claim form in Scotland or Northern Ireland the court must, where there is a concurrent remedy in Scotland or Northern Ireland, have regard to the comparative cost and convenience of proceeding in England and, where relevant, to the powers and jurisdiction of the relevant courts in Scotland or Northern Ireland³.

¹ CPR Sch 1 RSC Ord 11 r 1(1)(k). As to the CPR see PARA 37 note 3 ante. As to domicile generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

² See CPR Sch 1 RSC Ord 11 r 1(1)(c). See also *Re Lane, Lane v Robin* (1886) 55 LT 149; *Harvey v Dougherty* (1887) 56 LT 322.

³ CPR Sch 1 RSC Ord 11 r 4(3). A similar rule applies to county court proceedings: see CPR Sch 1 RSC Ord 11 r 10; and COURTS.

UPDATE

711, 712 Service out of jurisdiction, Appeals

CPR Sch 1 RSC Ords 11, 59 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(1) ADMINISTRATION AND OTHER REMEDIES/712. Appeals.

712. Appeals.

Appeal lies from the High Court to the Court of Appeal in accordance with the rules generally applicable to such appeals¹, and the time for appealing is similarly limited². For this purpose no distinction is made between claims under the normal procedure³ and claims under the alternative procedure⁴. Permission to appeal is required either from the Court of Appeal or the High Court⁵.

Appeals lie from county courts in accordance with the law and practice generally applicable to appeals from those courts⁶.

1 See CPR Sch 1 RSC Ord 59. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

2 See CPR Sch 1 RSC Ord 59 r 4. See also *Re Herwin, Herwin v Herwin* [1953] Ch 701, [1953] 2 All ER 782, CA.

3 See PARA 709 ante; and CIVIL PROCEDURE.

4 See PARA 709 ante; and CIVIL PROCEDURE.

5 See CPR Sch 1 RSC Ord 59 r 1B(1), (3).

6 See the County Courts Act 1984 s 77 (as amended); CPR Sch 1 RSC Ord 59 rr 1, 19. As to appeals from the county court see generally COURTS.

UPDATE

711, 712 Service out of jurisdiction, Appeals

CPR Sch 1 RSC Ords 11, 59 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(2) DETERMINATION OF QUESTIONS/713. Personal representatives' right to the court's guidance.

(2) DETERMINATION OF QUESTIONS

713. Personal representatives' right to the court's guidance.

Where questions of difficulty arise in the administration or distribution of an estate, the personal representatives are entitled to have those questions determined by the court¹ unless all the persons concerned, being of full legal capacity and between them absolutely entitled, determine the matter by agreement. The costs of such an application to the court are normally payable out of the estate². The court's jurisdiction to determine such questions cannot be excluded by the terms of the will or otherwise³.

The Civil Procedure Rules provide that a claim may be issued for the determination of any question or for any remedy which could be determined or granted, as the case may be, in an administration claim⁴.

1 In giving directions on a personal representative's or trustee's application the court is engaged solely in determining what should be done in the best interests of the estate and not in determining the rights of the parties: *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, PC. Where an application to the court involves the surrender of a discretion to the court by personal representatives or trustees the court may adjourn the question for an inquiry: see *Re Somech, Westminster Bank Ltd v Phillips* [1957] Ch 165, [1956] 3 All ER 523. As to the procedure in county courts see the County Courts Act 1984 s 76; CPR Sch 1 RSC Ord 85; CPR Sch 2 CCR Ord 1 r 6; and COURTS. As to the CPR see PARA 37 note 3 ante.

2 As to costs see PARA 746 et seq post.

3 See *Re Wynn's Will Trusts, Public Trustee v Newborough* [1952] Ch 271, [1952] 1 All ER 341; and WILLS vol 50 (2005 Reissue) PARA 478.

4 See CPR Sch 1 RSC Ord 85 r 2(1); and PARA 705 ante. For the meaning of 'administration claim' see PARA 705 note 3 ante.

UPDATE

713 Personal representatives' right to the court's guidance

NOTE 1--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058.

TEXT AND NOTE 4--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(2) DETERMINATION OF QUESTIONS/714. Determination of questions without administration.

714. Determination of questions without administration.

A claim may be brought¹ for the determination of any of the following questions without administration²:

- (1) any question arising in the administration of the estate of a deceased person or in the execution of a trust³;
- (2) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust⁴; and
- (3) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust⁵.

In addition, claims may be brought for orders requiring or directing an executor, administrator or trustee to: (a) furnish and, if necessary, verify accounts⁶; (b) pay money into court in his capacity as such⁷; or (c) do or abstain from doing a particular act in his capacity as such⁸.

An order may also be made approving any sale, purchase, compromise or other transaction by a person in his capacity as executor, administrator or trustee⁹, or directing any act to be done which the court could order to be done if the estate or trust were being administered or executed as the case may be under the direction of the court¹⁰.

1 The alternative procedure for claims under CPR Pt 8 will normally be appropriate: see PARA 709 ante. As to the CPR see PARA 37 note 3 ante.

2 CPR Sch 1 RSC Ord 85 r 2(2).

3 CPR Sch 1 RSC Ord 85 r 2(2)(a).

4 CPR Sch 1 RSC Ord 85 r 2(2)(b).

5 CPR Sch 1 RSC Ord 85 r 2(2)(c).

6 CPR Sch 1 RSC Ord 85 r 2(3)(a).

7 CPR Sch 1 RSC Ord 85 r 2(3)(b). See further PARA 732 post.

8 CPR Sch 1 RSC Ord 85 r 2(3)(c).

9 CPR Sch 1 RSC Ord 85 r 2(3)(d).

10 CPR Sch 1 RSC Ord 85 r 2(3)(e). The alternative procedure for claims under CPR Pt 8 will be appropriate where personal representatives or trustees require leave to distribute on the footing that a person is dead: see *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723; *Re Newson-Smith's Settlement, Grice v Newson-Smith* [1962] 3 All ER 963n, [1962] 1 WLR 1478 (in which the former originating summons procedure was used). Where a beneficiary is presumed dead, it is open to a personal representative to take out missing beneficiary insurance as an alternative to applying to the court, notwithstanding that he is a beneficiary of the estate: *Re Evans, Evans v Westcombe* [1999] 2 All ER 777.

UPDATE

714 Determination of questions without administration

TEXT AND NOTES--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058. As to procedural rules applicable to claims relating to the administration of estates of deceased persons see now TRUSTS vol 48 (2007 Reissue) PARA 1074-1079.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(2) DETERMINATION OF QUESTIONS/715. Jurisdiction of the court.

715. Jurisdiction of the court.

Where the claimant brings an administration claim¹ or a claim for the determination of any question without administration² under the alternative procedure, the court may at any stage order the claim to continue as if the claimant had not used the alternative procedure³ and, if it does so, the court may give any directions it considers appropriate⁴.

Where a defendant contends that the alternative procedure should not be used⁵ he must state his reasons when he files his acknowledgement of service⁶. If no objection is taken in the court of first instance, it cannot be taken in the Court of Appeal⁷.

1 For the meaning of 'administration claim' see PARA 705 note 3 ante.

2 Ie any question referred to in CPR Sch 1 RSC Ord 85 r 2: see PARAS 713-714 ante. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

3 Ie under CPR Pt 8. As to the alternative procedure see PARA 709 ante.

4 See CPR 8.1(3).

5 Ie because there is a substantial dispute of fact or the use of the alternative procedure is not required or permitted by a rule or practice direction: see CPR 8.8(1)(a), (b).

6 See CPR 8.8(1).

7 See *Re Turcan* (1888) 58 LJ Ch 101, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(3) PARTIES/716. Who may institute proceedings.

(3) PARTIES

716. Who may institute proceedings.

An administration claim may be instituted by either the personal representatives¹, the creditors or the beneficiaries². Where in a claim brought by the beneficiaries the estate is found to be insolvent, the proceedings will be reconstituted with the creditors as claimants and the personal representatives and beneficiaries as defendants. The beneficiaries will only continue as parties to the claim to enable them to be before the court when the question of costs is determined³.

1 A personal representative cannot bring an administration claim against a single creditor as sole defendant: *Mandeville v Mandeville* (1888) 23 LR Ir 339, CA; *Re Roe, Roe v Squire* (1911) 45 ILT 144; *Re Bradley, Bradley v Barclays Bank Ltd* [1956] Ch 615, [1956] 3 All ER 113. The proper procedure is for the personal representative to persuade a friendly creditor to make a claim, on behalf of himself and all other creditors (*Mandeville v Mandeville* supra), or to present a petition for the administration of the estate as an insolvent estate: see the Insolvency Act 1986 s 421; the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 823, 824. As to the administration of insolvent estates see PARA 399 et seq ante.

2 As to the administration of small estates by the Public Trustee see PARAS 707-708 ante.

3 *Re Van Oppen, Roberts v Gray* [1935] WN 51. Beneficiaries should not normally be made defendants in an administration claim brought by creditors: see PARA 718 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(3) PARTIES/717. Parties.

717. Parties.

The general rule in administration claims¹ or claims for the determination of questions without administration² is that all the executors or administrators of the estate or trustees of the trust, as the case may be, to which the claim relates, must be parties to the proceedings³. Where the proceedings are brought by executors, administrators or trustees, any of them who does not consent to being joined as a claimant must be made a defendant⁴. An executor who has not proved should not be made a party⁵ unless he has acted as executor⁶ or intermeddled with the assets⁷. A judgment for general administration will not be made in the presence only of an administrator ad litem⁸ or of an executor de son tort⁹.

It is not necessary¹⁰ for all persons having a beneficial interest in or claim against the estate to be parties to the claim, but the claimant may make such of those persons parties as he thinks fit having regard to the nature of the remedy claimed¹¹. Where in proceedings under a judgment or order given or made in a claim for the administration under the direction of the court of the estate of a deceased person, a claim in respect of a debt or liability is made against the estate by a person not a party to the proceedings, only the personal representatives are entitled to appear without the court's permission; and the court may direct or allow any other party to appear in addition to or in substitution for the personal representatives on such terms as to costs or otherwise as it thinks fit¹².

- 1 For the meaning of 'administration claim' see PARA 705 note 3 ante.
- 2 See PARA 714 ante.
- 3 CPR Sch 1 RSC Ord 85 r 3(1). See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.
- 4 CPR Sch 1 RSC Ord 85 r 3(1). See also *Latch v Latch* (1875) 10 Ch App 464. See further *Re Dracup, Field v Dracup* (1892) 36 Sol Jo 327; *Lacons v Warmoll* [1907] 2 KB 350 at 368, CA, per Buckley LJ; *M'Sweeney v Murphy* [1919] 1 IR 16. The court has a general power to order a person to be added as a new party: see CPR 19.1(2). As to the court's power to make representation orders and to direct service of notice of judgment so as to bind persons not parties: see CPR Sch 1 RSC Ord 15 rr 13-16; and PARAS 226, 294 ante, 808-809 post. See also CIVIL PROCEDURE.
- 5 *Dyson v Morris* (1842) 1 Hare 413; *Strickland v Strickland* (1842) 12 Sim 463.
- 6 *Vickers v Bell* (1864) 4 De GJ & Sm 274.
- 7 *Re Lovett, Ambler v Lindsay* (1876) 3 ChD 198.
- 8 *Dowdeswell v Dowdeswell* (1878) 9 ChD 294, CA.
- 9 *Rowsell v Morris* (1873) LR 17 Eq 20. As to the executor de son tort see PARA 53 et seq ante.
- 10 Ie notwithstanding CPR 19.2 and without prejudice to the court's powers under CPR Pt 19: see CPR Sch 1 RSC Ord 85 r 3(2).
- 11 CPR Sch 1 RSC Ord 85 r 3(2). A legatee's action is taken to be for himself and the other legatees whether so expressed or not: *Re Greaves, Bray v Tofield* (1881) 18 ChD 551 at 554.
- 12 CPR Sch 1 RSC Ord 85 r 3(3).

UPDATE

717 Parties

TEXT AND NOTES--CPR Sch 1 RSC Ord 15, Sch 1 RSC Ord 85 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(3) PARTIES/718. Creditor's claim.

718. Creditor's claim.

A creditor may take proceedings for the administration of the personal estate either on his own behalf alone or on behalf of himself and all other creditors¹. Where the creditor desires to have the realty administered as well as the personalty, he may claim as against such assets on his own behalf alone².

In a claim brought by a creditor the personal representative completely represents the estate³, and the residuary legatee should not be made a party⁴. Until judgment, the creditor, although claiming on behalf of himself and all other creditors, has the control of the claim, and, subject to the court's direction, may deal with the claim as he pleases⁵. However, the judgment enures for the benefit of all creditors⁶ and the claimant creditor cannot subsequently accept payment of his debt and allow the claim to be dismissed⁷. Even with the consent of the creditor, a legatee cannot avail himself of the creditor's claim; he must begin a fresh claim⁸.

1 *Re Blount, Nayler v Blount* (1879) 27 WR 865; *Re Greaves, Bray v Tofield* (1881) 18 ChD 551 at 554.

2 Where a creditor is claiming in a representative capacity, this fact ought to be shown on the face of the claim form: see *Re Tottenham, Tottenham v Tottenham* [1896] 1 Ch 628. It was formerly held that he must bring a claim on behalf of himself and all other creditors (*Worraker v Pryer* (1876) 2 ChD 109, dissenting from *Cooper v Blissett* (1876) 1 ChD 691; *Re Royle, Fryer v Royle* (1877) 5 ChD 540; *Re Greaves, Bray v Tofield* (1881) 18 ChD 551); except where the realty was devised to trustees who had power to sell and give receipts (*Re McKeown* (1874) 22 WR 292; *Wooldridge v Norris* (1868) LR 6 Eq 410).

3 The personal representative is normally the only proper party to attend and oppose claims brought against the estate: *Re Watts, Smith v Watts* (1882) 22 ChD 5, CA.

4 *Re Youngs, Doggett v Revett, Re Youngs Vollum v Revett* (1885) 30 ChD 421, CA; *Re Ward, Bemment v Balls* (1878) 47 LJ Ch 781. For an instance where a beneficiary should be made an additional defendant see PARA 716 text and note 3 ante.

5 *Woodgate v Field* (1842) 2 Hare 211 at 214; *Wood v Westall* (1831) You 305.

6 *Re Greaves, Bray v Tofield* (1881) 18 ChD 551 at 552-553.

7 *Handford v Storie* (1825) 2 Sim & St 196.

8 *Re Ainsworth, Cockcroft v Sanderson* [1895] WN 153.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(3) PARTIES/719. Requirements for making a claim.

719. Requirements for making a claim.

To enable a person to maintain a claim he must have an existing interest in the property. The interest may be vested or contingent, future or remote, but it must be an existing interest; a mere possibility is insufficient¹. Accordingly, a member of a class of possible next of kin of a living person cannot maintain an administration claim², nor need the class be served with the judgment³; but a member of a contingent class, for example surviving brothers and sisters of a person who will take if that person dies without leaving issue, has a sufficient interest⁴. A person whose claim against the estate would not support a claim at law against the representative, for example a person claiming under an annuity granted by the deceased in his lifetime in respect of which there are no arrears⁵, or a person claiming arrears under an order for the payment of maintenance⁶, is not entitled to an administration order. A claim for costs due in pursuance of an order of a competent court creates a debt which can be enforced against the debtor's estate, and upon which an administration claim can be founded⁷; and where the testator's business has been carried on by the personal representative, an administration claim may be maintained by a creditor of the business, although there were no creditors of the testator, or of the estate, prior to his death⁸.

1 *Davis v Angel* (1862) 4 De GF & J 524; *Clowes v Hilliard* (1876) 4 ChD 413. It is submitted that persons interested under a discretionary trust have a sufficient interest to maintain a claim; cf *Re Beckett's Settlement, Re Beckett, Eden v Von Stutterheim* [1940] Ch 279 at 285; *A-G v Farrell* [1931] 1 KB 81, CA.

2 *Clowes v Hilliard* (1876) 4 ChD 413, commenting upon *Roberts v Roberts* (1848) 2 Ph 534; *Fussell v Dowding* (1884) 27 ChD 237.

3 *Fowler v James* (1847) 1 Ph 803.

4 *Peacock v Colling* (1885) 54 LJ Ch 743, CA.

5 *Re Hargreaves, Dicks v Hare* (1890) 44 ChD 236, CA. As to claims maintainable against the personal representative see PARA 729 et seq post.

6 *Re Woolgar, Woolgar v Hopkins* [1942] Ch 318, [1942] 1 All ER 583.

7 *Re Naters, Ainger v Naters* (1919) 88 LJ Ch 521 (order of consistory court, followed by a monition to pay which was never obeyed by the deceased).

8 *Re Bach, Walker v Bach, Lloyds Bank v Bach* [1892] WN 108; *Re Shorey, Smith v Shorey* (1898) 79 LT 349. See also PARA 460 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(4) CONSOLIDATION AND TRANSFER/720. Consolidation and conduct of claim.

(4) CONSOLIDATION AND TRANSFER

720. Consolidation and conduct of claim.

Where several claims are pending for the administration of the same estate, the court may on an application¹ made before judgment in any of the claims, or on its own initiative², have them consolidated³. After the order to consolidate, the claims proceed as one claim, and one judgment is pronounced in the consolidated claim⁴.

1 See CPR 3.3(1). The application should be made by application notice: see CPR Pt 23. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 3.3(1). Where the court proposes an order of its own initiative it may give any person likely to be affected by the order an opportunity to make representations (see CPR 3.3(2)(a)) but where it does not do so a party affected may apply to have the order set aside, varied or stayed (see CPR 3.3(5)(a)).

3 See CPR 3.1(2)(g).

4 The conduct of the consolidated claims should, as a rule, be given to the party who has the greatest interest in keeping down the costs of the proceedings: see *Re Prime's Estate* (1883) 48 LT 208 at 210. Therefore, a residuary legatee will be preferred to a creditor or executor: see *Penny v Francis* (1860) 7 Jur NS 248; *Kelk v Archer, Archer v Kelk* (1852) 16 Jur 605. As to the application of these cases following the enactment of the CPR see PARA 37 note 3 ante.

UPDATE

720 Consolidation and conduct of claim

NOTE 2--If the court of its own initiative strikes out a statement of case or dismisses an application (including an application for permission to appeal or for permission to apply for judicial review), and it considers that the claim or application is totally without merit, the court's order must record that fact and the court must at the same time consider whether it is appropriate to make a civil restraint order: CPR 3.3(7) (added by SI 2004/2072, amended by SI 2005/2292). 'Civil restraint order' means an order restraining a party (1) from making any further applications in current proceedings (a limited civil restraint order); (2) from issuing certain claims or making certain applications in specified courts (an extended civil restraint order); or (3) from issuing any claim or making any application in specified courts (a general civil restraint order):

CPR 2.3(1) (definition added by SI 2004/2072). A practice direction may set out (a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings; (b) the procedure where a party applies for a civil restraint order against another party; and (c) the consequences of the court making a civil restraint order: CPR 3.11 (added by SI 2004/2072).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(4) CONSOLIDATION AND TRANSFER/721. Transfer after administration order.

721. Transfer after administration order.

Where an order for the administration under the court's direction of the estate of a deceased person is made in the High Court the court may order proceedings in the Royal Courts of Justice or a district registry, or any part of such proceedings to be transferred from the Royal Courts of Justice to a district registry or from a district registry to the Royal Courts of Justice or to another district registry¹ and the High Court may order proceedings in any division to be transferred to another division².

An application for a transfer must, if the claim is proceeding in a district registry, be made to that registry³ and an application for the transfer of proceedings to or from a specialist list must be made to a judge dealing with claims in that list⁴. The application for the transfer may be made without notice⁵.

The rule was formerly not applied to an action against the representative personally⁶, nor would the court restrain a creditor who had, prior to the administration order, recovered judgment against the representative from pursuing his remedy on the judgment against the representative personally⁷, but the fact that an action against a representative includes a claim against him personally does not prevent the action being transferred or stayed so far as it seeks to enforce a claim against the defendant as representative⁸.

1 See CPR 30.2(4); and PARA 276 ante. For examples of the application of the former RSC Ord 4 r 5 (not reproduced in the CPR) see *Re Stubbs' Estate, Hanson v Stubbs* (1878) 8 ChD 154; *Re Timms* (1878) 26 WR 692; *West v Downman* (1879) 39 LT 666. The court is required to have regard to the criteria set out at CPR 30.3: see PARA 276 ante. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 30.5(1).

3 See CPR 30.2(6).

4 See CPR 30.5(3).

5 *Field v Field* [1877] WN 98; *Whitaker v Robinson* [1877] WN 201; *Re United Kingdom Electric Telegraph Co* (1881) 29 WR 332; *Re Sharpe, Scott v Sharpe* [1884] WN 28; *Re Capelovitch Estate and Will Trusts, Sandelson v Capelovitch* [1957] 1 All ER 33, [1957] 1 WLR 102. As to the form of the application see CPR Pt 23.

6 *Re* prior to the commencement of the CPR on 26 April 1999 (see PARA 37 note 3 ante). See *Chapman v Mason* (1879) 40 LT 678.

7 See *Re Womersley, Etheridge v Womersley* (1885) 29 ChD 557; *Haly v Barry* (1868) 3 Ch App 452 at 457 per Page Wood LJ.

8 See *Re Pimm, Malkin v Pimm, Steward v Sharpe (No 2)* [1916] WN 202, CA. It is likely that these principles remain applicable notwithstanding the CPR. See, however, PARA 37 note 3 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(4) CONSOLIDATION AND TRANSFER/722. Stay of proceedings after judgment in concurrent claim.

722. Stay of proceedings after judgment in concurrent claim.

Where several claims are commenced for the administration of the same estate and they are not consolidated before judgment is pronounced in one of them, the court may on an application¹ or on its own initiative² stay the whole or part of any proceedings or judgment either generally or until a specified date or event³. The general practice is that the costs of the proceedings which are stayed are made costs in the other claim⁴ but this practice will be departed from where the judgment has been unfairly obtained⁵, or where the relief sought by and obtainable in the other claims is more comprehensive than that in the claim in which the judgment has been made⁶, although in the latter case the judgment may be allowed to proceed on the undertaking of the parties to submit to the additional accounts and inquiries⁷. Where two claims are brought on behalf of claimants who are minors, the one that will be proceeded with is that which is more for their benefit⁸.

¹ See CPR 3.3(1). The application should be made by application notice: see CPR Pt 23. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

² See CPR 3.3(1). As to where the court proposes an order of its own initiative see PARA 720 note 2 ante.

³ See CPR 3.1(2)(f). See also *Taylor v Southgate* (1839) 4 My & Cr 203; *Wynne v Hughes* (1859) 26 Beav 377 at 382; *Harvey v Coxwell*, *Wilson v Coxwell* (1875) 32 LT 52. As to claims against the representative personally see PARA 721 ante.

⁴ *Gwyer v Peterson*, *Peterson v Peterson* (1858) 26 Beav 83; *Taylor v Southgate* (1839) 4 My & Cr 203; *Kenyon v Kenyon* (1866) 35 Beav 300. The costs are payable in due course of administration: *Re Clark*, *Cumberland v Clark* (1869) 4 Ch App 412.

⁵ *Harris v Gandy*, *Wills v Gandy* (1859) 1 De GF & J 13; *Rhodes v Barret*, *ex p Singleton* (1871) LR 12 Eq 479.

⁶ *Pickford v Hunter* (1831) 5 Sim 122; *Rigby v Strangways* (1846) 2 Ph 175; *Underwood v Jee* (1849) 1 Mac & G 276; *Hoskins v Campbell*, *Gibbon v Campbell* (1864) 2 Hem & M 43; *Zambaco v Cassavetti* (1871) LR 11 Eq 439.

⁷ *Gwyer v Peterson*, *Peterson v Peterson* (1858) 26 Beav 83; *Matthews v Palmer*, *Pritchard v Palmer* (1863) 11 WR 610; and see *Vanrenen v Piffard*, *Piffard v Vanrenen* (1865) 13 WR 425.

⁸ *Virtue v Miller* (1871) 19 WR 406. See also *Harris v Lightfoot*, *Harris v Harris* (1861) 10 WR 31.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(4) CONSOLIDATION AND TRANSFER/723. Conduct of proceedings after stay.

723. Conduct of proceedings after stay.

If a claim is stayed by reason of a judgment in another claim having been first obtained, the general rule is to give the conduct of the proceedings to the claimant in the first claim¹. The court has a discretion², and will depart from the rule where the relief sought in the stayed claim

is imperfect³, or the claim is defective⁴, or where the claim of the claimant whose claim was first instituted is disputed in good faith⁵.

The court has power to deprive a claimant of the conduct of the proceedings on account of delay⁶. As a general rule the person so deprived will not be allowed his costs of attending the taking of the accounts subsequent to his removal⁷, but he will be allowed his costs of appearing on further consideration to ask for costs up to his removal⁸.

1 *Frost v Ward* (1864) 2 De GJ & Sm 70; *Belcher v Belcher* (1865) 2 Drew & Sm 444; *Zambaco v Cassavetti* (1871) LR 11 Eq 439; *Rhodes v Barret, ex p Singleton* (1871) LR 12 Eq 479; *Matthews v Matthews, Willyams v Matthews* (1876) 45 LJ Ch 711 (conduct given to plaintiffs in first action, which was stayed, as being persons mainly interested in the estate); *Hawkes v Barrett* (1820) 5 Madd 17. The rule applied where the first action was in the Palatine Court (see COURTS) and the second, in which the decree was obtained, in the High Court: *Re Swire, Mellor v Swire* (1882) 21 ChD 647, CA. See also *Townsend v Townsend* (1883) 23 ChD 100, CA.

2 See *Re Swire, Mellor v Swire* (1882) 21 ChD 647, CA.

3 *Re Smith's Estate, McMurray v Mathew, Mathew v Mathew* (1876) 33 LT 804.

4 *Re McRae, Forster v Davis, Norden v McRae* (1883) 25 ChD 16, CA.

5 *Re Ross, Wingfield v Blair* [1907] 1 Ch 482.

6 *Sims v Ridge* (1817) 3 Mer 458 at 467; *Bennett v Baxter* (1840) 10 Sim 417; *Cook v Bolton* (1828) 5 Russ 282.

7 *Armstrong v Armstrong* (1871) LR 12 Eq 614.

8 *Joseph v Goode, Fisher v Goode* (1875) 23 WR 225. As to costs see PARA 746 et seq post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/724. Court's discretion to make order.

(5) THE JUDGMENT OR ORDER

724. Court's discretion to make order.

A judgment or order for the administration or execution under the court's discretion of an estate or trust need not be given or made unless in the court's opinion the questions at issue between the parties cannot properly be determined otherwise than under such a judgment or order¹. An order may be refused even though the claimant is a minor², or though the testator has directed his executors to take proceedings to have the estate administered by the court³.

1 CPR Sch 1 RSC Ord 85 r 5(1). As to the exercise of this discretion see *Re Wilson, Alexander v Calder* (1885) 28 ChD 457; *Re Gyhon, Allen v Taylor* (1885) 29 ChD 834, CA; *Campbell v Gillespie* [1900] 1 Ch 225; *De Quetteville v De Quetteville* (1902) 19 TLR 109; order varied on appeal (1903) 19 TLR 383, CA. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 *Re Blake, Jones v Blake* (1885) 29 ChD 913, CA.

3 *Re Stocken, Jones v Hawkins* (1888) 38 ChD 319, CA.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

724 Court's discretion to make order

TEXT AND NOTE 1--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/725. Chancery masters' powers.

725. Chancery masters' powers.

Where, in relation to proceedings in the Chancery Division, the Civil Procedure Rules provide for the court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed by any master or district judge of that division¹.

A master or district judge of the Chancery Division may not without the consent of the Vice-Chancellor²:

- (1) approve a compromise³:
- 15. (a) on behalf of a person under a disability where that person's interest in a fund, or if there is no fund, the amount of the claim, exceeds the prescribed maximum⁴; and
- 16. (b) on behalf of absent, unborn and unascertained persons⁵;
- (2) make declarations, except in plain cases⁶;
- (3) make final orders⁷ except for the removal of protective trusts where the interest of the principal beneficiary has not failed or determined⁸;
- (4) determine any question of law or as to the construction of a document raised by claim form under the normal procedure⁹ brought where there is a statutory or other requirement to do so¹⁰;
- (5) give permission to executors, administrators and trustees to bring or defend proceedings or to continue the prosecution or defence of proceedings, and granting an indemnity for costs out of the trust estate except in plain cases¹¹.

A master may also grant permission to distribute the estate of a deceased Lloyd's Name whose liabilities have been reinsured into Equitas without requiring the attendance of the applicants¹².

¹ See CPR 2.4. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

² *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1. As to other proceedings in the Chancery Division in which the consent of the Vice Chancellor is required see PARA 5.1(f)-(k).

³ *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(a). This provision does not apply to applications under the Inheritance (Provision for Family and Dependents) Act 1975 (see PARA 665 et seq ante): see *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(a).

4 *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(a)(i). The prescribed maximum is £100,000: see PARA 5.1(a)(i).

5 *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(a)(ii).

6 *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(b).

7 le under the Variation of Trusts Act 1958 s 1(1): see *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(c).

8 *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(c).

9 le under CPR Pt 8: see *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(d).

10 *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(d).

11 *Practice Direction--Allocation of Cases to Levels of Judiciary* (1999) PD 2B para 5.1(e).

12 *Chancery Division Practice Direction 12G--Estates of Deceased Lloyd's Names* (1999) CDPD 12; *Re Yorke, Stone v Chataway* [1997] 4 All ER 907.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

725 Chancery masters' powers

NOTE 2--*Practice Direction--Allocation of Cases to Levels of Judiciary* (2001) PD 2B para 5.1(g) substituted.

NOTE 12--*Chancery Division Practice Direction 12G--Estates of Deceased Lloyd's Names* (1999) CDPD 12 now *Practice Note* [2001] 3 All ER 765.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/726. Order for accounts.

726. Order for accounts.

Where an administration claim¹ is brought by a creditor of the estate of a deceased person or by a person claiming to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust, and the claimant alleges that no or insufficient accounts have been furnished by the executors or administrators, then without prejudice to its other powers, the court may²:

- (1) stay the proceedings for a specified period to enable proper accounts to be furnished to the claimant³; or
- (2) give judgment or make an order for administration if this is necessary to prevent proceedings by other creditors or persons so entitled and include in that

order a direction that no proceedings are to be taken under the judgment or order or under any particular account or inquiry without the leave of the judge in person⁴.

Nothing short of an order for administration will prevent a creditor from bringing a claim against the representatives⁵.

- 1 For the meaning of 'administration claim' see PARA 705 note 3 ante.
- 2 CPR Sch 1 RSC Ord 85 r 5(2). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.
- 3 CPR Sch 1 RSC Ord 85 r 5(2)(a).
- 4 CPR Sch 1 RSC Ord 85 r 5(2)(b).
- 5 *Re Barrett, Whitaker v Barrett* (1889) 43 ChD 70; *Re Mills, Mills v Mills* [1884] WN 21.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

726 Order for accounts

TEXT AND NOTES 1-4--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/727. Conduct of sale of trust property.

727. Conduct of sale of trust property.

Where in an administration claim¹ an order is made for the sale of any property vested in executors, administrators or trustees, those executors, administrators or trustees, as the case may be, have the conduct of the sale unless the court otherwise directs².

- 1 For the meaning of 'administration claim' see PARA 705 note 3 ante.
- 2 CPR Sch 1 RSC Ord 85 r 6. See also CIVIL PROCEDURE; SALE OF LAND vol 42 (Reissue) PARA 135. As to the CPR see PARA 37 note 3 ante.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

727 Conduct of sale of trust property

TEXT AND NOTES--CPR Sch 1 RSC Ord 85 r 6 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/728. Order not limited to assets within the jurisdiction.

728. Order not limited to assets within the jurisdiction.

The judgment for the administration of a deceased's personal estate is not limited to assets within the jurisdiction, even where he died domiciled abroad¹.

¹ *Re Maxwell, Stirling-Maxwell v Cartwright* (1879) 11 ChD 522, CA.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/729. Order for account on footing of wilful default.

729. Order for account on footing of wilful default.

Where wilful default is alleged against the personal representative, it is sufficient to establish one instance of wilful default in order to entitle the claimant to an account on that footing¹. In taking the account under a judgment based on the footing of wilful default it is open to the claimant to go into other instances, and in this respect a wilful default claim differs from a claim brought in respect of active breaches of trust².

Where, however, a claimant has obtained a common administration judgment against a representative he cannot, in taking the accounts, charge him with wilful default, nor can he maintain a subsequent claim against him charging him with wilful default without the permission of the court³. Where, however, in his statement of case he has made an allegation of wilful default, and the claim to relief in respect of it has not been dismissed, the court may, even after a common administration judgment, at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts to be taken on that footing⁴.

¹ See EQUITY vol 16(2) (Reissue) PARA 451. See also *Re Tebbs, Redfern v Tebbs* [1976] 2 All ER 858.

2 See EQUITY vol 16(2) (Reissue) PARA 451.

3 *Laming v Gee* (1878) 10 ChD 715. Permission may be given without requiring proof that the information on which the fresh claim is founded was not acquired in time to be utilised in the former claim: *Re Kurtz, Emerson v Henderson* (1904) 90 LT 12. See also *Re Hoghton, Hoghton v Fidley* (1874) LR 18 Eq 573.

4 *Re Symons, Luke v Tonkin* (1882) 21 ChD 757. See also *Edmonds v Robinson* (1885) 29 ChD 170 at 175 per Kay J.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/730. Liability on a common account.

730. Liability on a common account.

Where the account directed by the order is what is called a common account, the personal representative is bound not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show what he has done with the money received; and, in taking the account, disbursements made by him in breach of his fiduciary duties will be disallowed¹.

1 *Re Stuart, Smith v Stuart* (1896) 74 LT 546; *Re Newland, Bush v Summers* (1904) 49 Sol Jo 14. In taking an account, all just allowances are to be made without any direction to that effect: See CPR Pt 4; *Practice Direction--Accounts, Inquiries etc* (1999) PD 40A para 4. See also CIVIL PROCEDURE; EQUITY vol 16(2) (Reissue) PARA 455. As to the CPR see PARA 37 note 3 ante.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/731. Limitation of liability.

731. Limitation of liability.

A personal representative who is entitled to set up the Limitation Act 1980¹ as a defence must do so at the time the order for accounts is made, so that the order can be qualified by a reference to that Act, or the question directed to be reserved until further consideration; and if this is not done, the defence cannot be raised while the accounts are being vouched or at the hearing on further consideration².

1 See the Limitation Act 1980 s 22; and LIMITATION PERIODS vol 28 (2008) PARAS 916, 1161 et seq. For the necessity of pleading the Limitation Act 1980 see CPR Pt 16; *Practice Direction--Statements of Case* (1999) PD 16 para 16.1. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 *Re Williams, Jones v Williams* [1916] 2 Ch 38.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

731 Limitation of liability

NOTE 1--*Practice Direction--Statements of Case* (1999) PD 16 para 16.1 revoked. See now para 13.1.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/732. Order to lodge money in court.

732. Order to lodge money in court.

A personal representative, though not shown to be insolvent or to have abused his trust, may be ordered to lodge in court a sum of money found due from him on taking his accounts, or admitted to be in his hands¹ or in the hands of his firm², or to be due to the estate from him³. The money need not be in his possession at the date of the order; it is sufficient if he is proved to have received it and never to have discharged himself of it⁴. It must be shown, however, that the money is or has been in his actual, and not merely his constructive, possession or control; the master's certificate finding a balance due is not of itself sufficient evidence of the actual possession or control⁵.

The court should not order a representative to pay money into court upon an interim application, except where it is made out to the court's satisfaction that he has the sum claimed in his hands⁶ or under his control⁷; nor should the court, upon an administration claim⁸ being made, order a representative to pay money into court unless it is actually in his hands⁹. It is not sufficient that it has been in his hands and that he is responsible for it¹⁰.

1 *Strange v Harris* (1791) 3 Bro CC 365.

2 *Johnson v Aston* (1822) 1 Sim & St 73.

3 *Rothwell v Rothwell* (1825) 2 Sim & St 217. A representative ordered to pay money into court is not as a result deprived of his lien on the fund for his costs: *Blenkinsop v Foster* (1838) 3 Y & C Ex 205.

4 *Middleton v Chichester* (1871) 6 Ch App 152.

5 *Re Fewster, Herdman v Fewster* [1901] 1 Ch 447; *Re Wilkins, Emsley v Wilkins* (1901) 46 Sol Jo 14. As to the master's certificate see CIVIL PROCEDURE.

6 *Neville v Matthewman* [1894] 3 Ch 345, CA, commenting upon *Freeman v Cox* (1878) 8 ChD 148; *Crompton and Evans' Union Bank v Burton* [1895] 2 Ch 711.

7 *Re Benson, Elletson v Pillers* [1899] 1 Ch 39.

8 See PARA 709 ante; and CIVIL PROCEDURE. For the meaning of 'administration claim' see PARA 705 note 3 ante.

9 See CPR Sch 1 RSC Ord 85 r 2(3)(b); and PARA 714 ante. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

10 *Nutter v Holland* [1894] 3 Ch 408, CA, disapproving *Re Chapman, Fardell v Chapman* (1886) 54 LT 13.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

732 Order to lodge money in court

TEXT AND NOTES 8, 9--CPR Sch 1 RSC Ord 85 r 2(3)(b) revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/733. Interest on debts and legacies.

733. Interest on debts and legacies.

Where an account of the debts¹ of a deceased person is directed by any judgment, then, unless the deceased's estate is insolvent, or the court otherwise orders, interest is allowed on any debt which carries interest at the rate it carries², and, on any other debt, from the date of judgment at the rate payable on judgment debts at that date³ or, in relation to expenses incurred after judgment, the date when the expenses became payable⁴. A creditor who has established his debt in proceedings under the judgment and whose debt does not carry interest is entitled to interest from the date of the judgment at the rate payable on judgment debts at that time out of any assets which may remain after satisfying the costs of the proceedings, the debts which have been established and the interest on such of those debts as by law carry interest⁵. The payment of such interest is subject to the deduction of income tax at the standard rate by the representative⁶.

Where an account of legacies is directed by any judgment, then, subject to any directions contained in the will or codicil in question, and to any order made by the court, interest is

allowed on each legacy at the rate of 6 per cent per annum beginning at the expiration of one year after the testator's death⁷.

- 1 For these purposes, 'debt' includes funeral, testamentary or administration expenses: CPR Sch 1 RSC Ord 44 r 9(3). As to debts incurred in running the deceased's business see PARA 461 ante. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.
- 2 CPR Sch 1 RSC Ord 44 r 9(1)(a). As to interest in respect of county court judgments or orders see CPR Pt 40; *Practice Direction--Accounts Inquiries etc* (1999) PD 40A paras 9.1-12.
- 3 CPR Sch 1 RSC Ord 44 r 9(1)(b). The current rate is 8%: see the Judgment Debts (Rate of Interest) Order 1993, SI 1993/564; and CIVIL PROCEDURE.
- 4 CPR Sch 1 RSC Ord 44 r 9(3), (1)(b).
- 5 CPR Sch 1 RSC Ord 44 r 9(2).
- 6 *Re Michelham, Michelham v Michelham* [1921] 1 Ch 705.
- 7 CPR Sch 1 RSC Ord 44 r 10. See also PARA 499 ante.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

733 Interest on debts and legacies

TEXT AND NOTES--CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

NOTE 2--*Practice Direction--Accounts Inquiries etc* PD 40A paras 9.1-12 revoked. As to interest see now paras 14, 15 (as substituted).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/734. Enforcement of order for payment into court.

734. Enforcement of order for payment into court.

An order for payment into court by a personal representative may be enforced by committal¹, but the court has a discretion to refuse the committal².

The order may also be enforced by a writ of sequestration against the personal representative's estate and effects³. The person obtaining the writ is not a judgment creditor of the representative, and the court has no jurisdiction under the writ to direct a sale of the representative's real estate⁴.

- 1 See CPR Sch 1 RSC Ord 45 rr 1(2)(b), 5. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.
- 2 See CONTEMPT OF COURT vol 9(1) (Reissue) PARA 506.

3 See CPR Sch 1 RSC Ord 45 r 1(2)(c).

4 *Johnson v Burgess* (1873) LR 15 Eq 398; *Pratt v Inman* (1889) 43 ChD 175 at 180. As to the effect of writs of sequestration see CIVIL PROCEDURE vol 12 (2009) PARAS 1269, 1380 et seq.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

734 Enforcement of order for payment into court

TEXT AND NOTES 1-3--CPR Sch 1 RSC Ord 45 r 1(1) revoked: SI 2001/2792.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/735. Order fixing time for payment.

735. Order fixing time for payment.

A judgment for the recovery from the defendant of a sum of money, as distinguished from an order to pay a sum of money into court, cannot be supplemented by an order fixing the time for the payment by him of the sum of money, even where the defendant stands in a fiduciary position¹.

¹ *Re Oddy, Major v Harness* [1906] 1 Ch 93, CA; *Drewett v Edwards* (1877) 37 LT 622; *Hulbert and Crowe v Cathcart* [1894] 1 QB 244. See also CPR Sch 1 RSC Ord 45 r 1, 5(2), 6. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/736. Effect of judgment on personal representative's powers.

736. Effect of judgment on personal representative's powers.

After a judgment has been given for general administration, the personal representative's powers of selling the property, dealing with or distributing the assets and managing the estate cannot be exercised without the court's previous consent¹, notwithstanding that the judgment directs that none of the accounts and inquiries ordered is to be prosecuted except with the leave of the judge in person². After judgment the personal representative is not entitled to do any act which affects the relative rights of creditors³. He cannot, accordingly, pay one creditor in preference to another⁴, nor can he give a creditor a valid acknowledgement of a debt so as to prevent the creditor's right of action being statute-barred⁵. The judgment does not, however, determine the personal representative's right of retainer⁶; nor does it, where no receiver has been appointed or injunction granted, deprive him of his legal powers to deal with the assets so as to invalidate the title of persons without notice of the judgment claiming under a disposition made by him in exercise of his legal powers⁷.

An order for an inquiry is not a decision on the question to which the inquiry relates where the question itself is by the same order directed to stand over⁸.

1 *Re Furness, Wilson v Kenmare* [1943] Ch 415, [1944] 1 All ER 66; *Widdowson v Duck* (1817) 2 Mer 494 at 499; *Bethell v Abraham* (1873) LR 17 Eq 24; *Minors v Battison* (1876) 1 App Cas 428, HL. As to the effect upon the discretionary powers of executor-trustees of a judgment for the execution of the trusts of a will see TRUSTS vol 48 (2007 Reissue) PARA 979.

2 *Re Furness, Wilson v Kenmare* [1943] Ch 415, [1944] 1 All ER 66.

3 *Shewen v Vanderhorst* (1830) 2 Russ & M 75; affd (1831) 1 Russ & M 347.

4 As to the abolition of the right to prefer see PARA 401 note 3 ante. A creditor who has obtained payment of part of his debt, before the administration order, will not receive any further payment until all the other creditors are paid proportionately: *Mitchelson v Piper* (1836) 8 Sim 64.

5 *Phillips v Beal (No 2)* (1863) 32 Beav 26.

6 As to the abolition of the right to retain in cases of death after 1 January 1972 see PARA 401 note 3 ante.

7 *Berry v Gibbons* (1873) 8 Ch App 747; *Re Hoban, Lonergan v Hoban* [1896] 1 IR 401; *Re Furness, Wilson v Kenmare* [1943] Ch 415 at 420-421, [1944] 1 All ER 66 at 69. See also *Halley v O'Brien* [1920] 1 IR 330, CA (where sale without consent of the court; consent given at the trial of an action for specific performance of the contract of sale, held sufficient).

8 See *Re Wright, Blizard v Lockhart* [1954] Ch 347 at 353, [1954] 1 All ER 864 at 867 per Roxburgh J; affd [1954] Ch 347 at 357-358, [1954] 2 All ER 98 at 101-102, CA, per Romer LJ. See also CIVIL PROCEDURE vol 12 (2009) PARA 1179.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(5) THE JUDGMENT OR ORDER/737. Effect of proceedings and judgment in creditors' claims.

737. Effect of proceedings and judgment in creditors' claims.

A judgment for administration prevents time from running against the claims of all creditors coming in under the judgment¹, but the mere institution of administration proceedings is not sufficient to effect this².

1 *Re Greaves, Bray v Tofield* (1881) 18 ChD 551.

2 *Re Greaves, Bray v Tofield* (1881) 18 ChD 551, commenting upon *Sterndale v Hankinson* (1827) 1 Sim 393.

UPDATE

724-737 The Judgment or Order

In relation to any claim in the High Court relating to the estate of a deceased person, the court has the power to make the judgment binding on non-parties: see CPR 19.8A (added by SI 2001/256).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/738. Directions by the court.

(6) PROCEEDINGS UNDER JUDGMENT

738. Directions by the court.

Where a judgment given in proceedings in the Chancery Division contains directions which make it necessary to proceed in private under the judgment the court may, when giving judgment or at any time during proceedings under the judgment, give further directions for the conduct of those proceedings, including, in particular, directions with respect to¹:

- (1) the manner in which any account or inquiry is to be prosecuted²;
- (2) the evidence to be adduced in support of it³;
- (3) the preparation and service of the draft of any deed or other instrument on the parties to be bound by it which is directed by the judgment to be settled by the court and the service of any objections to the draft⁴;
- (4) the parties required to attend all or any part of the proceedings⁵;
- (5) the representation by the same solicitors of parties who constitute a class and by different solicitors of parties who ought to be separately represented⁶; and
- (6) the time within which each proceeding is to be taken, and may fix a day or days for further attendance⁷.

Earlier directions may be revoked or varied⁸.

1 CPR Sch 1 RSC Ord 44 r 3(1). See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

2 CPR Sch 1 RSC Ord 44 r 3(1)(a).

3 CPR Sch 1 RSC Ord 44 r 3(1)(b).

4 CPR Sch 1 RSC Ord 44 r 3(1)(c). See also CPR Pt 40; *Practice Direction--Judgments and Orders* (1999) PD 40B para 2.

- 5 CPR Sch 1 RSC Ord 44 r 3(1)(d).
- 6 CPR Sch 1 RSC Ord 44 r 3(1)(e).
- 7 CPR Sch 1 RSC Ord 44 r 3(1)(f).
- 8 CPR Sch 1 RSC Ord 44 r 3(2).

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/739. Notice of judgment.

739. Notice of judgment.

Where in a claim for the administration of the estate of a deceased person, the execution of a trust or the sale of any property, the court gives a judgment or makes a direction which affects persons not parties to the claim, the court may, when giving the judgment or at any stage of the proceedings under the judgment, direct notice¹ of the judgment to be served on any such person². Any person duly served is accordingly bound as if he had been an original party to the claim³ unless he applies within one month after service of the notice on him, and after acknowledging service, to discharge, vary or add to the judgment⁴. He may also, after service of the notice on him, and after acknowledging service, attend the proceedings under the judgment⁵. The notice must be indorsed with a memorandum⁶ and served in the manner directed by the court⁷.

1 The notice must be in the prescribed form: see CPR Sch 1 RSC Ord 44 r 2(3); and the text to notes 6-7 *infra*. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 *ante*.

2 CPR Sch 1 RSC Ord 44 r 2(1). If it appears that it is not practicable to serve notice of a judgment on a person directed to be served the court may dispense with service and may also order that such person be bound by the judgment: CPR Sch 1 RSC Ord 44 r 2(2). See also *Chancery Guide* (1999) Ch 10. As to sales under orders of the court see SALE OF LAND vol 42 (Reissue) PARAS 133-136.

3 CPR Sch 1 RSC Ord 44 r 2(1).

4 CPR Sch 1 RSC Ord 44 r 2(4).

5 CPR Sch 1 RSC Ord 44 r 2(5).

6 See CPR Sch 1 RSC Ord 44 r 2(3).

7 See CPR Sch 1 RSC Ord 44 r 2(3). The notice should be accompanied by a form of acknowledgement of service with such modifications as may be appropriate and the copy of the notice to be served must be a sealed copy: see CPR Sch 1 RSC Ord 44 r 2(3). As to service generally see CPR Pt 6. As to the form of acknowledgement of service see CPR Pt 10.

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

739 Notice of judgment

NOTE 7--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/740. Advertisement, examination and adjudication of claims.

740. Advertisement, examination and adjudication of claims.

The procedure for ascertaining claims under an order for general administration under the court's direction is governed by special rules¹. These apply where in proceedings for the administration under the court's direction of the estate of a deceased person the judgment directs any account of debts or other liabilities of the deceased's estate to be taken or any inquiry for next of kin or other unascertained claimants to be made², and where in proceedings for the execution under the court's direction of a trust the judgment directs any such inquiry to be made³. These rules also apply, with the necessary modifications, where in any other proceedings the judgment directs any account of debts or other liabilities to be taken or any inquiry to be made⁴.

1 See CPR Sch 1 RSC Ord 44 rr 5-8; and PARAS 741-1487 post. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 CPR Sch 1 RSC Ord 44 r 4(a).

3 CPR Sch 1 RSC Ord 44 r 4(b).

4 CPR Sch 1 RSC Ord 44 r 4.

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/741. Advertisement for claims.

741. Advertisement for claims.

The court may, when giving a judgment or at any stage of proceedings under a judgment, give directions for the issue of advertisements for creditors or other claimants and may fix the time

within which creditors and claimants may respond¹. Where, on the day appointed for adjudication of claims, any claim is not then disposed of, the adjudication should be adjourned to a day appointed by the court, and the court may fix the time within which any evidence supporting or opposing the claim is to be filed².

1 CPR Sch 1 RSC Ord 44 r 5. See also CIVIL PROCEDURE. In deciding whether to do so the court should have regard to any advertisement previously issued by the personal representatives or trustees concerned: *Cuthbert v Wharmby* [1869] WN 12. As to previously issued advertisements see PARAS 382-383 ante. At least a month is normally allowed for claims: see *Re Bracken, Doughty v Townson* (1889) 43 ChD 1, CA. As to the CPR see PARA 37 note 3 ante.

2 See *Cardell v Hawke* (1868) LR 6 Eq 464.

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/742. Examination of claims.

742. Examination of claims.

Where an account of debts or other liabilities of the estate of a deceased person has been directed, such party as the court may direct must¹: (1) examine the claims of persons claiming to be creditors of the estate²; (2) determine, so far as he is able, to which of such claims the estate is liable³; and (3) at least seven clear days before the time appointed for adjudicating on claims, make a witness statement or affidavit stating his findings and his reasons for them and listing all the other debts of the deceased which are or may still be due⁴.

Where an inquiry for next of kin or other unascertained claimants has been directed, such party as the court may direct must⁵: (a) examine the claims⁶; (b) determine, so far as he is able, which of them are valid⁷; and (c) at least seven clear days before the time appointed for adjudicating on claims, make a witness statement or affidavit stating his findings and his reasons for them⁸.

If the personal representatives or trustees concerned are not the parties directed by the court to examine claims, they must join with the party directed to examine them in making the witness statement or affidavit⁹.

1 CPR Sch 1 RSC Ord 44 r 6(1). See CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

2 CPR Sch 1 RSC Ord 44 r 6(1)(a).

3 CPR Sch 1 RSC Ord 44 r 6(1)(b).

4 CPR Sch 1 RSC Ord 44 r 6(1)(c).

5 CPR Sch 1 RSC Ord 44 r 6(2). As to kin inquiries see PARA 744 post.

6 CPR Sch 1 RSC Ord 44 r 6(2)(a).

- 7 CPR Sch 1 RSC Ord 44 r 6(2)(b).
- 8 CPR Sch 1 RSC Ord 44 r 6(2)(c).
- 9 CPR Sch 1 RSC Ord 44 r 6(3). If they disagree they must swear separate affidavits.

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/743. Adjudication on claims and notice of adjudication.

743. Adjudication on claims and notice of adjudication.

For the purpose of adjudicating on claims the court may: (1) direct any claim to be investigated in such manner as it thinks fit¹; (2) require any claimant to attend² and prove his claim or to furnish further particulars or evidence of it³; or (3) allow any claim after or without proof⁴.

The court must give directions that every creditor whose claim or any part of whose claim has been allowed or disallowed and who did not attend when the claim was disposed of be served with a notice informing him of that fact⁵.

- 1 CPR Sch 1 RSC Ord 44 r 7(a). See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.
- 2 A creditor who is not a party has no right to attend: see *Re Schwabacher, Stern v Schwabacher* [1907] 1 Ch 719.
- 3 CPR Sch 1 RSC Ord 44 r 7(b). If proof is required the claimant should obtain corroboration (*Hill v Wilson* (1873) 8 Ch App 888; *Vavasseur v Vavasseur* (1909) 25 TLR 250; *Re Finch, Finch, v Finch* (1883) 23 ChD 267 at 271, CA; *Re Whittaker, Whittaker v Whittaker* (1882) 21 ChD 657; *Minister of Stamps v Townend* [1909] AC 633, PC) although this is not always essential (*Re Garnett, Gandy v Macauley* (1885) 31 ChD 1, CA; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA; *Rawlinson v Scholes* (1898) 79 LT 350; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Re Goff, Featherstonehaugh v Murphy* (1914) 111 LT 34).
- 4 CPR Sch 1 RSC Ord 44 r 7(c).
- 5 CPR Sch 1 RSC Ord 44 r 8.

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/744. Kin inquiries.

744. Kin inquiries.

Among the inquiries which may be directed by the court are inquiries as to relationships, generally called kin inquiries¹, which may arise both on intestacy and under the terms of a will. In complex cases a pedigree must be prepared, with cross-reference to supporting witness statements or affidavits, preferably by the oldest living members of the family with the necessary knowledge to show the relevant relationships and the dates of relevant births, marriages and deaths, which must be strictly proved so far as this can be done².

Where some of the persons entitled to a share in a fund are known but there is, or is likely to be, difficulty or delay in ascertaining other persons so entitled, the court may direct, or allow, immediate payment of their shares to the known persons without reserving any part of those shares to meet the subsequent costs of ascertaining the other persons³. Where a beneficiary is presumed dead, it is open to a personal representative to take out missing beneficiary insurance as an alternative to applying to court⁴.

1 See CPR Sch 1 RSC Ord 44 r 6(2); and PARA 742 ante. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

2 As to proof of births, marriages and deaths by certified copies of register entries and as to the use of family papers and ancient documents see CIVIL PROCEDURE. As to registration of the person see generally REGISTRATION CONCERNING THE INDIVIDUAL. As to adopted and illegitimate children see PARA 478 ante; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 125, 375 et seq.

3 CPR Pt 40; *Practice Direction--Accounts, Inquiries etc* (1999) PD 40A para 7.

4 *Re Evans, Evans v Westcombe* [1999] 2 All ER 777. The personal representative can do this notwithstanding that he is a beneficiary of the estate.

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(6) PROCEEDINGS UNDER JUDGMENT/745. Appeal against master's order.

745. Appeal against master's order.

The result of proceedings before a master under a judgment is stated in the form of an order¹ and must contain such directions as the master thinks fit as to the further consideration of the proceedings in which it is made² but otherwise has effect as a final order disposing of proceedings in which it is made³.

Notice of an appeal⁴ against an order of the master, other than an order to be acted on by the Accountant General or an order passing a receiver's account⁵, must be issued within 14 days after the order is made and must state the grounds of the appeal⁶. On the hearing of the appeal, fresh evidence (other than evidence as to matters which have occurred after the date of the master's order) is not admissible except on special grounds⁷ but the judge hearing the appeal has power to draw inferences of fact⁸.

- 1 CPR Sch 1 RSC Ord 44 r 11(1). See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.
- 2 CPR Sch 1 RSC Ord 44 r 11(3).
- 3 CPR Sch 1 RSC Ord 44 r 11(2).
- 4 le the notice referred to in CPR Sch 1 RSC Ord 58 r 1(2).
- 5 CPR Sch 1 RSC Ord 44 r 12(a), (e). If the order is to be acted upon by the Accountant General or is an order passing a receiver's account notice of appeal must be issued not later than two clear days after the making of the order and, where the order is to be acted on by the Accountant General, a copy of it must be served on him as soon as practicable after it is made: CPR Sch 1 RSC Ord 44 r 12(a), (e). As to the Accountant General see COURTS.
- 6 CPR Sch 1 RSC Ord 44 r 12(a).
- 7 CPR Sch 1 RSC Ord 44 r 12(c).
- 8 CPR Sch 1 RSC Ord 44 r 12(d). The power to draw inferences of fact is the same as in the Court of Appeal under CPR Sch 1 RSC Ord 59 r 10(3): CPR Sch 1 RSC Ord 44 r 12(d).

UPDATE

738-745 Proceedings under Judgment

CPR Sch 1 RSC Ord 44 revoked: SI 2002/2058.

745 Appeal against master's order

TEXT AND NOTES 4-8--CPR Sch 1 RSC Ord 44 r 12, Ords 58, 59 revoked: SI 2000/221.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/746. General rule.

(7) COSTS

746. General rule.

The general rule is that the costs of and incidental to all proceedings in both the High Court and the county court, including proceedings relating to the administration of estates and trusts, are in the discretion of the court which has full power to determine by whom and to what extent the costs are to be paid¹. This general rule is subject to the proviso that a personal representative² or trustee is entitled to the costs of proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative, and the court may otherwise order only on the ground that he has acted unreasonably or has in substance acted for his own benefit rather than for the benefit of the fund³.

Accordingly, a personal representative who has acted properly is allowed his full costs of the administration proceedings as a matter of course⁴, and in priority to the costs of all other parties⁵. He is entitled to be allowed all costs properly incurred on an indemnity basis⁶. This

right to a full indemnity⁷ may, however, be modified if he has failed to adopt the normal disinterested and independent attitude proper to a trustee. In such a case part of his costs may be disallowed⁸. His prior right to costs is not affected by the fact that the order on further consideration directs the costs of all parties to be paid out of the funds in court and the funds prove to be insufficient to meet all the costs⁹.

Where trustees or personal representatives are parties the court may make an order deciding the incidence of costs in advance of the trial¹⁰. Trustees and personal representatives may, and probably should, seek directions even before the issue of proceedings by way of a 'Beddoes' application¹¹.

1 Supreme Court Act 1981 s 51 (as substituted by the Courts and Legal Services Act 1990 s 4(1)): see COURTS. See also CPR 44.3. As to the costs provisions under the CPR see CPR Pts 43-48. See also CIVIL PROCEDURE. Despite the wealth of new provisions dealing with costs the overall consequence is to give the court a very broad discretion as to costs. The former common law principles, although not generally adverted to in the CPR may be of assistance to the court in exercising its discretion. See, however, PARA 37 note 3 ante.

2 As to the right to costs of a solicitor personal representative who or whose firm acts for the estate see PARA 40 ante.

3 *Re Beddoe*[1893] 1 Ch 547, CA. See also CPR 48.4. Cf para 327 ante.

4 The same practice applies to the costs of proceedings for the determination of questions without administration of the estate: *Re Medland, Eland v Medland*(1889) 41 ChD 476, CA. See also PARA 747 post. As to the procedure see PARA 709 ante.

5 *Tanner v Dancey* (1846) 9 Beav 339; *Sanderson v Stoddart* (1863) 32 Beav 155; *Dodds v Tuke*(1884) 25 ChD 617; *Re Love, Hill v Spurgeon*(1885) 29 ChD 348, CA; *Re Barne, Lee v Barne* (1890) 62 LT 922. They are allowed in priority to a mortgagee plaintiff's costs of sale: *Re Spensley's Estate, Harrison v Spensley* (1872) 42 LJ Ch 21.

6 See CPR 48.4(2).

7 As to the right to indemnity see further PARA 437 ante.

8 *Re Dargie, Miller v Thornton-Jones*[1954] Ch 16, [1953] 2 All ER 577; *Holding and Management Ltd v Property Holding and Investment Trust plc*[1988] 2 All ER 702, [1988] 1 WLR 644.

9 *Re Griffith, Jones v Owen*[1904] 1 Ch 807, following *Gaunt v Taylor* (1843) 2 Hare 413, and not following *Swale v Milner* (1834) 6 Sim 572. As to the circumstances in which an order will be made under what is now the Solicitors Act 1974 s 73 (see LEGAL PROFESSIONS vol 66 (2009) PARA 1011 et seq), allowing the costs of the creditor's solicitor on the common fund basis in a creditor's action for administration see *Re Drew, Simmons and Simmons v Drew* (1913) 135 LT Jo 323.

10 *Re Westdock Realisations Ltd*[1988] BCLC 354; *McDonald v Horn*[1995] 1 All ER 961, CA.

11 *Re Beddoe*[1893] 1 Ch 547, CA: see the text to note 3 supra. See also *Re Evans* [1986] 1 WLR 101; *McDonald v Horn*[1995] 1 All ER 961, CA; *Alsop Wilkinson (a firm) v Neary*[1995] 1 All ER 431, [1996] 1 WLR 1220; *Singh v Bhasin* (1998) Times, 21 August.

UPDATE

746 General rule

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/747. Costs of administration proceedings generally.

747. Costs of administration proceedings generally.

In the case of proceedings begun under the alternative procedure¹ for the determination of questions arising in the administration of the estate², the costs of all parties are allowed out of the estate where the application is made by the personal representative, or by a beneficiary or creditor³ where there is some difficulty which would have justified an application by the personal representative⁴. If, however, a beneficiary applies to the court without real justification or takes advantage of the alternative procedure to have a question determined which, but for the procedure, should have been commenced using the normal procedure⁵ or is otherwise properly described as hostile litigation, the court may apply the rule that the unsuccessful party should pay the costs of the successful party⁶.

1 Ie under CPR Pt 8: see PARA 709 ante. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 Ie under CPR Sch 1 RSC Ord 85.

3 As to creditors' costs see PARAS 752, 754 post.

4 See *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406; *Re Halston, Ewen v Halston* [1912] 1 Ch 435; *Re Flecher, King v King* (1918) 62 Sol Jo 740.

5 Ie under CPR Pt 7: see PARA 709 ante.

6 *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406 at 415 per Kekewich J; *Re Halston, Ewen v Halston* [1912] 1 Ch 435 at 439; *Re Flecher, King v King* (1918) 62 Sol Jo 740.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/748. Fund for payment of costs.

748. Fund for payment of costs.

Such costs of a claim for administration as are properly payable out of the estate are to be treated as testamentary and administration expenses¹. Accordingly, in the case of deaths after 1925, the costs are to be paid in due course of administration in accordance with the rules and principles considered earlier in this title².

1 *Miles v Harrison* (1874) 9 Ch App 316; *Harloe v Harloe* (1875) LR 20 Eq 471; *Penny v Penny* (1879) 11 ChD 440.

2 See PARA 410 et seq ante. As to the payment of costs in the case of death before 1926 see PARA 430 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/749. When personal representative is liable for costs.

749. When personal representative is liable for costs.

Where administration proceedings are rendered necessary by the personal representative's gross and indefensible neglect to furnish accounts, he will be ordered to pay all the costs, including the costs of taking and vouching the accounts¹. So, too, a representative who unnecessarily institutes administration proceedings will be ordered to pay the costs². In a claim against a personal representative, where the court, after hearing the facts, makes an order for administration without any reservation of costs, it is not in accordance with the practice to entertain an application on further consideration that the representative should be ordered to pay costs down to the judgment; but this practice does not extend to a case where the order is made without evidence on both sides, or full discussion, either for the sake of convenience or to save expense, or otherwise in circumstances in which the court has not a sufficient knowledge of the facts³.

1 *Heugh v Scard* (1875) 33 LT 659; *Re Skinner, Cooper v Skinner* [1904] 1 Ch 289, holding that *Hewett v Foster* (1844) 7 Beav 348 does not represent the modern practice. As to other cases where the representative has been ordered to pay the costs see *Eglin v Sanderson* (1862) 3 Giff 434; *Kemp v Burn* (1863) 4 Giff 348; *Gresham v Price* (1865) 35 Beav 47; *Re Bell's Estate, Bath v Bell* (1878) 39 LT 422; *Re Radclyffe, Pearce v Radclyffe* (1881) 29 WR 420; *Re Wallett, Hayter v Wells* (1883) 32 WR 26. As to cases where a trustee may be ordered to pay the costs of an action for account or for the execution of the trust brought by the beneficiary see TRUSTS vol 48 (2007 Reissue) PARA 911.

2 *Re Cabburn, Gage v Rutland* (1882) 46 LT 848.

3 *Re Gardner, Roberts v Fry* [1911] WN 155.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/750. Costs of personal representative in default.

750. Costs of personal representative in default.

No costs are given to a personal representative who is in default to the estate, until the default is made good¹. An executor not in default need not appear by the same solicitor as a defaulting co-executor; he is entitled to act by a separate solicitor, and if he does so he will be awarded his costs². If he chooses to appear by the same solicitor as his defaulting co-executor he will be allowed only his proportion of the costs out of the estate³. A defaulting executor who becomes bankrupt is entitled to his costs subsequent to the bankruptcy, but the prior costs must be set off against the debt⁴. The personal representative of a defaulting executor, fairly accounting, is entitled to his costs out of the assets, even if the assets are insufficient to repair the breach of trust⁵.

1 The personal representative's solicitor is in no better position: *Re O'Kean, Ferris v O'Kean* [1907] 1 IR 223, CA.

2 *Smith v Dale* (1881) 18 ChD 516 at 518 per Jessel MR.

3 *Smith v Dale* (1881) 18 ChD 516, dissenting from *Watson v Row* (1874) LR 18 Eq 680. See also *McEwan v Crombie* (1883) 25 ChD 175.

4 *Samuel v Jones* (1843) 2 Hare 246; *Re Vowles, O'Donoghue v Vowles* (1886) 32 ChD 243, following *Re Basham, Hannay v Basham* (1883) 23 ChD 195, and *Lewis v Trask* (1882) 21 ChD 862, and dissenting from *Re Clare, Clare v Clare* (1882) 21 ChD 865.

5 *Haldenby v Spofforth* (1846) 9 Beav 195; *Palmer v Jones* (1874) 43 LJ Ch 349; *Re Kitto, Kitto v Luke* (1879) 28 WR 411.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/751. Mere delay or mistake no reason for deprivation.

751. Mere delay or mistake no reason for deprivation.

Mere delay in rendering accounts is not of itself sufficient ground for visiting a personal representative with the payment of costs, or even for depriving him of his costs¹; nor is the fact that he has made a mistake, or has endeavoured to charge in his accounts items which he is not legally entitled to charge, provided his claims are not dishonest claims, nor such as no reasonable man could say ought to have been put forward².

1 *Heighington v Grant* (1845) 1 Ph 600; *White v Jackson* (1852) 15 Beav 191.

2 *Re Jones, Christmas v Jones* [1897] 2 Ch 190 at 197-198 per Kekewich J. See also *Turner v Hancock* (1882) 20 ChD 303, CA; *Travers v Townsend* (1828) 1 Mod 496; *Bennett v Atkins* (1835) 1 Y & C Ex 247; *Smith v Cremer* (1875) 24 WR 51.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/752. Costs of parties other than personal representatives.

752. Costs of parties other than personal representatives.

The costs of all parties other than the personal representative are entirely within the discretion of the court¹; neither a claimant residuary legatee nor a creditor is entitled to his costs out of the estate as a matter of right². A person unnecessarily added as a party has the right to attend, but is not required to appear or to brief counsel for the hearing. If he is satisfied that he has no claim, and still attends he will not be entitled to his costs³. A claimant who obtains judgment in an administration claim without any reservation as to costs is entitled to his costs of taking the accounts⁴; and as a general rule the court allows the costs of all necessary and proper parties to administration proceedings as a first charge upon the estate which is being administered⁵; but it will only allow them where the proceedings are in their origin directed, with some show of reason and a proper foundation, for the benefit of the estate, or have in their result conducted to that benefit⁶. Thus a legatee tenant for life who had received the whole of his income to date was disallowed the costs of administration proceedings instituted by him and made to pay personally the costs occasioned by his 'idle' insistence on an income account⁷.

1 See the Supreme Court Act 1981 s 51 (as substituted); CPR 44.3; *Re McClellan, McClellan v McClellan* (1885) 29 ChD 495, CA; *Re Amory, Westminster Bank Ltd v British Sailors' Society Inc at Home and Abroad* [1951] 2 All ER 947n. See also CIVIL PROCEDURE; COURTS. As to the CPR see PARA 37 note 3 ante.

2 The costs of the next friend of a residuary legatee who is a minor are not the costs of the next friend but of the minor claimant, and cannot be set off against a debt which the next friend owes to the estate: *Re Barton, Holland v Kersley* (1912) 56 Sol Jo 380. A creditor's costs of establishing his debt will usually be allowed if he is successful unless the court otherwise directs. The judgment or order may have already provided for the costs of the claim without limiting the award to costs incurred to the date of the order so that all the proceedings in private properly conducted under the order are governed by it: see *Krehl v Park* (1875) 10 Ch App 334; *Quarrell v Beckford* (1816) 1 Madd 269 at 285-286. As to the old practice see *Farrow v Austin* (1881) 18 ChD 58, CA.

3 *Re Amory, Westminster Bank Ltd v British Sailors' Society Inc at Home and Abroad* [1951] 2 All ER 947n.

4 *Re Roby, Sherbrooke v Taylor* (1916) 60 Sol Jo 291.

5 *Loomes v Stotherd* (1823) 1 Sim & St 458 at 461; *Ford v Earl of Chesterfield (No 3)* (1856) 21 Beav 426; *Larkins v Paxton* (1835) 2 My & K 320; *Barker v Wardle* (1835) 2 My & K 818.

6 *Bartlett v Wood* (1861) 9 WR 817 at 818 per Lord Westbury LC; *Turner v Frampton* (1846) 2 Coll 331.

7 *Croggan v Allen* (1882) 22 ChD 101.

UPDATE

752 Costs of parties other than personal representatives

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/753. Personal representative's right to indemnity by creditor.

753. Personal representative's right to indemnity by creditor.

A claimant creditor must, so far as the estate is insufficient to meet them, pay the personal representative's costs of the claim where it appears that there were no assets at the time the claim was brought sufficient to meet his claim, whether or not he had notice of the insufficiency of the assets¹. Where there is a deficiency of assets any costs payable out of the estate are added to the debts and apportioned among them².

1 *Hibernian Bank v Lauder* [1898] 1 IR 262; *Bluett v Jessop* (1821) Jac 240; *Sullivan v Bevan* (1855) 20 Beav 399; *King v Bryant* (1841) 4 Beav 460; *Fuller v Green* (1857) 24 Beav 217.

2 *Morshead v Reynolds* (1856) 21 Beav 638. As to interest on debts see PARA 733 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/754. When creditor is entitled to costs on the indemnity basis.

754. When creditor is entitled to costs on the indemnity basis.

Where the estate was insufficient for payment of debts, the former rule was that a creditor was entitled to his costs on the indemnity basis both where he was the original claimant¹ and where

he had obtained the conduct of the claim²; on the other hand, if the estate was not deficient, he obtained his costs only on the standard basis³.

Similarly, the claimant in a legatee's action where the estate was insufficient to pay legacies⁴ was entitled to his costs on the indemnity basis but only if the fund was sufficient to pay creditors⁵.

It is submitted that although the Civil Procedure Rules have introduced wholly new costs provisions the same principles may be applicable⁶.

1 *Tootal v Spicer* (1831) 4 Sim 510; *Hood v Wilson* (1831) 2 Russ & M 687; *Re Flynn, Guy v M'Carthy* (1886) 17 LR Ir 457; *Henderson v Dodds* (1866) LR 2 Eq 532. As to the distinction between the indemnity and standard bases see CPR 44.4. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 *Re Richardson, Richardson v Richardson* (1880) 14 ChD 611.

3 See the law on this subject reviewed by Stirling LJ in *Re New Zealand Midland Rly Co, Smith v Lubbock* [1901] 2 Ch 357, CA, explaining *Stanton v Hatfield* (1836) 1 Keen 358, and *Goldsmith v Russell* (1855) 5 De GM & G 547. Where the general estate was sufficient to pay separate creditors, but insufficient to pay joint creditors of a testator who was one of a firm of traders, the separate creditor claimant obtained costs on the solicitor and client basis: *Re McRea, Norden v McRea* (1886) 32 ChD 613.

4 *Cross v Kennington* (1848) 11 Beav 89; *Thomas v Jones* (1860) 1 Drew & Sm 134; *Re Harvey, Wright v Woods* (1884) 26 ChD 179.

5 *Weston v Clowes* (1847) 15 Sim 610, disapproving *Burkitt v Ransom* (1846) 2 Coll 536; *Wetenhall v Dennis* (1863) 33 Beav 285. See also *Re Richardson, Richardson v Richardson* (1880) 14 ChD 611 at 613 per Jessel MR, explaining that *Re Burrell, Burrell v Smith* (1870) LR 9 Eq 443, was not intended to alter the general rule; and *Re Wilkins, Wilkins v Rotherham* (1884) 27 ChD 703.

6 See PARA 746 note 1 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/755. Costs of overpaid beneficiary.

755. Costs of overpaid beneficiary.

As a rule a beneficiary who has been overpaid will not be paid his separate costs, even though the deficiency has arisen from the wasting of the estate subsequently to the payment to him¹.

1 *Re Winslow, Frere v Winslow* (1890) 45 ChD 249.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/756. Proceedings by unpaid residuary legatees.

756. Proceedings by unpaid residuary legatees.

Where a portion of the estate has been distributed among certain residuary legatees, and the unpaid residuary legatees institute administration proceedings, the legatees who have received

their shares cannot be ordered to contribute to the costs of the claim, but they will not get their costs without first bringing in their shares and contributing to the costs¹.

¹ *Mackenzie v Taylor* (1844) 7 Beav 467; *Re Tann, Tann v Tann, Gravatt v Tann (No 2)* (1869) LR 7 Eq 436; *Hilliard v Fulford* (1876) 4 ChD 389.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/757. Costs of inquiries.

757. Costs of inquiries.

The costs of inquiries to ascertain the persons entitled to a legacy, money or a share, or otherwise incurred in relation to such inquiries, are normally payable out of the legacy, money or share concerned¹. The costs will be directed to be paid out of the general residuary estate where the difficulty arises from the language the testator has employed², or where the testator must be taken to have contemplated that the payment of a legacy would involve some proceedings on behalf of the legatee or by the personal representative³. Where, however, the testator has directed his testamentary expenses to be paid out of residue the court is not bound in every case to direct that the costs of inquiries to ascertain the persons entitled are to be borne out of general residue⁴; and the court ought not to be so ready, as was once the practice, to direct that the costs of inquiries relating to particular shares ought to come out of general residue⁵.

The costs of establishing a claim as next of kin of an intestate are allowed out of the estate⁶.

¹ See *Re Whitaker, Denison-Pender v Evans* [1911] 1 Ch 214. As to partial distribution of the estate without provision for further costs see PARA 744 ante.

² *Re Groom, Booty v Groom* [1897] 2 Ch 407; *Re Hall-Dare, Le Marchant v Lee Warner* [1916] 1 Ch 272. In such circumstances the costs of all parties may, in a proper case, be taxed on the indemnity basis: see *Re Hall-Dare, Le Marchant v Lee Warner* supra at 278; *Re Wernher, Wernher v Beit* (1918) 117 LT 801 at 813. Where the share in question is a share of residue, the issue will be whether the costs are to be borne by that share or by the general residue.

³ *Re Parton, Parton v Parton* (1911) 131 LT Jo 106.

⁴ *Re Townend, Knowles v Jessop* [1914] WN 145. See also *Re Baumgarten, Bevan v Rosenbaum* (1900) 82 LT 711; *Re Lacy, Dyson v Speight* (1908) 124 LT Jo 293; *Re Vincent, Rohde v Palin* [1909] 1 Ch 810; *Re Phillips, Public Trustee v Phillips* [1938] 4 All ER 483, CA. The executor cannot, by paying a legacy into court, relieve the residue from bearing the costs of an inquiry as to the persons entitled to the legacy: *Re Gibbons' Will* (1887) 36 ChD 486; *Re Trick's Trusts, ex p Willoby* (1869) 5 Ch App 170; *Re Birkett* (1878) 9 ChD 576.

⁵ *Graham v Lord Clinton* (1899) 81 LT 717 at 719 per Stirling J. For the former practice see *Re Gibbons' Will* (1887) 36 ChD 486; *Re Reeve's Trusts* (1877) 4 ChD 841; *Wilson v Squire* (1842) 13 Sim 212; *Re Haseldine, Grange v Sturdy* (1886) 31 ChD 511 at 521, CA.

⁶ *Bennett v Wood* (1837) 7 Sim 522; *Bakewell v Tagart* (1838) 3 Y & C Ex 173.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/758. Costs of improper litigation.

758. Costs of improper litigation.

The court will not permit costs occasioned by improper litigation, the representation of unnecessary parties¹, or by negligent conduct of administration proceedings, to be paid out of the estate under its care². A beneficiary who sets up a case of misconduct against the representative which he fails to substantiate must, of course, pay the costs of the proceedings³. The costs of a successful claimant in an issue directed to be tried in administration proceedings will be ordered to be paid in full out of the assets⁴.

1 *Re Amory, Westminster Bank Ltd v British Sailors' Society Incorporated at Home and Abroad* [1951] 2 All ER 947n. See also PARA 752 ante.

2 *Brown v Burdett* (1888) 40 ChD 244, CA; *Re Scowby, Scowby v Scowby* [1897] 1 Ch 741, CA. See also *Curteis v Candler* (1821) 6 Madd 123.

3 *Williams v Jones* (1886) 34 ChD 120, CA.

4 *Re Dunn, Brinklow v Singleton* (1902) 46 Sol Jo 432.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/759. Costs of unsuccessful claims and appeals.

759. Costs of unsuccessful claims and appeals.

The general rule is that the costs occasioned by an unsuccessful claim, or unsuccessful resistance to any claim, to any property are not to be paid out of the estate unless the court otherwise directs¹. The costs of a claimant, even though he fails to establish his claim, may, however, be allowed out of the estate where he has enabled the court to construe the will or to distribute the fund².

The costs of an unsuccessful appeal on a point of construction may be allowed in a proper case³. In such a case the trustees should always be represented, and their costs will come out of the estate, but the appellant should, where there are numerous respondents in the same interest, serve them with notice that the court will be asked to allow only one set of costs against him if his appeal fails⁴. However, a party who does not join in a successful appeal may remain bound by the order below⁵.

1 See CPR 44.3(2). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 The court has a general discretion to allow an unsuccessful party his costs: see CPR 44.3(2)(b). See eg *Thomason v Moses* (1842) 5 Beav 77; *Wedgwood v Adams* (1844) 8 Beav 103; *Merlin v Blagrove* (1858) 25 Beav 125. For other instances see *Westcott v Culliford* (1844) 3 Hare 265 at 274; *Cooper v Pitcher* (1845) 4 Hare 485; *Johnston v Todd* (1845) 8 Beav 489; *Boreham v Bignall* (1850) 8 Hare 131; *Lee v Delane* (1850) 4 De G & Sm 1.

3 *Re Stuart, Johnson v Williams* [1940] 4 All ER 80, CA. Personal representatives should not themselves appeal where they are seeking only the court's protection. See *Re Londonderry's Settlement, Peart v Walsh* [1965] Ch 918, [1964] 3 All ER 855, CA.

4 See note 3 supra.

5 See *Elliot v Lord Joicey* [1935] AC 209 at 235, HL, per Lord Russell of Killowen.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/9. ADMINISTRATION AND DETERMINATION OF QUESTIONS BY THE COURT/(7) COSTS/760. Appeal against order for costs.

760. Appeal against order for costs.

The general rule is that an appeal solely against an order for costs to the Court of Appeal lies only with the leave of the judge or of the Court of Appeal¹ and the same principle has been applied to an appeal from an order as to costs of a master (or district judge)².

Accordingly no appeal lies, without permission, against an order allowing a personal representative his costs or depriving him of those costs. However, because the court can only deprive a personal representative of his costs on the ground of misconduct, and whether he has been guilty of misconduct is a question of fact, a personal representative's appeal against an order depriving him of or directing him to pay costs, although still necessitating permission, will not be considered as an appeal against a wrongful exercise of discretion³. On the other hand an order allowing him his costs must have been made either on the ground that he has been guilty of no misconduct and is therefore entitled to them, or that, although guilty of misconduct, the court has in its discretion allowed him his costs, and an appeal can only be made on the basis that the judge or master wrongfully exercised his discretion⁴.

The personal representative's costs of another claim are not costs within the discretion of the court before which the administration proceedings are pending; they are in the nature of charges and expenses, but permission is still required to appeal whether an order is made in the administration proceedings allowing them out of the estate or an order is made allowing the representative his costs, charges and expenses⁵.

1 See CPR Sch 1 RSC Ord 59 r 1B. See also *Scherer v Counting Instruments Ltd* [1986] 2 All ER 529, [1986] 1 WLR 615n, CA. As to the CPR see PARA 37 note 3 ante.

2 *Hoddle v CCF Construction Ltd* [1992] 2 All ER 550.

3 As to the former rule that this right arose without permission see *Re Knight's Will* (1884) 26 ChD 82 at 90, CA, per Cotton LJ; *Re Love, Hill v Spurgeon* (1885) 29 ChD 348, CA; *Re Pugh, Lewis v Pritchard* (1888) 57 LT 858, CA. A declaration that the court does not think fit to make any order as to costs amounts to a judicial decision that the trustee is not entitled to his costs, and that he cannot retain them out of the estate: *Re Hodgkinson, Hodgkinson v Hodgkinson* [1895] 2 Ch 190, CA.

4 *Charles v Jones* (1886) 33 ChD 80, CA.

5 See CPR Sch 1 RSC Ord 59 r 1B. See also CIVIL PROCEDURE. As to the former rules see *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, CA; *Bew v Bew* [1899] 2 Ch 467, CA, overruling *Re Chennell, Jones v Chennell* (1878) 8 ChD 492, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/761. General rule.

10. PERSONAL REPRESENTATIVES' LIABILITIES

(1) LIABILITY FOR DECEASED'S OBLIGATIONS

761. General rule.

All claims founded upon any obligation under a contract, bond or covenant, or upon any debt or duty which might have been enforced by suing the deceased in his lifetime, are in like manner enforceable, to the extent of assets, against the personal representative¹, even though he is not named in the instrument creating the obligation². The personal representative can never be under a duty to commit a breach of a contract so enforceable, but if it is onerous he should take every opportunity to come to terms³.

1 Bac Abr, Executors and Administrators (P) 1; Shep Touch (7th Edn) 482; *Hambly v Trott* (1776) 1 Cowp 371 at 375; *Hyde v Skinner* (1723) 2 P Wms 196; *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881.

2 Went Off Ex (14th Edn) 239, 243. See further the Law Reform (Miscellaneous Provisions) Act 1934 s 1 (as amended); and PARA 814 et seq post. As to the survival of causes of action in contract see CONTRACT vol 9(1) (Reissue) PARA 1078. See also the Consumer Credit Act 1974 s 86; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 249. See further the Matrimonial Causes Act 1973 s 36 (as amended).

3 *Ahmed Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624, [1938] 3 All ER 106, PC.

UPDATE

761 General rule

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/762. Contract founded on personal considerations.

762. Contract founded on personal considerations.

Where a contract is founded on personal considerations, the death of either party before breach of the contract¹ puts an end to the relationship². Accordingly an agreement between an employer and employee or master and apprentice³ is determined by the death of either party⁴, and an agreement to write a book or to paint a picture is determined by the death of the author or artist⁵. On the death of a master no portion of the premium could be recovered by an apprentice⁶, and a similar rule held in the case of a solicitor to whom a clerk had been articulated⁷; but personal representatives are entitled to sue for any money actually earned by the deceased during his lifetime⁸, and even for remuneration accruing due after his death, if it appears to have been the intention of the parties that remuneration should continue payable after the termination of the contract⁹.

1 A personal representative may be sued if the contract was broken in the deceased's lifetime: *Siboni v Kirkman* (1836) 1 M & W 418 at 423.

2 *Farrow v Wilson* (1869) LR 4 CP 744; *Graves v Cohen* (1929) 46 TLR 121. See also CONTRACT vol 9(1) (Reissue) PARAS 757, 903. The common law rule has been modified, however, in cases to which the Law Reform (Frustrated Contracts) Act 1943 applies, and permits the recovery of money paid upon a contract that has become frustrated even though there has not been a total failure of consideration: see CONTRACT vol 9(1) (Reissue) PARA 913 et seq.

3 As to apprentices see EMPLOYMENT vol 39 (2009) PARA 9.

4 *Farrow v Wilson* (1869) LR 4 CP 744; *R v Peck* (1698) 1 Salk 66; and see EMPLOYMENT vol 40 (2009) PARAS 679, 689.

5 *Hall v Wright* (1859) EB & E 765 at 794, Ex Ch, per Pollock CB; *Siboni v Kirkman* (1836) 1 M & W 418 at 423.

6 *Whincup v Hughes* (1871) LR 6 CP 78. See also note 3 supra.

7 *Ferns v Carr* (1885) 28 ChD 409, dissenting from *Hirst v Tolson* (1850) 2 Mac & G 134. See also RESTITUTION vol 40(1) (2007 Reissue) PARA 94.

8 *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311.

9 *Wilson v Harper* [1908] 2 Ch 370. See also PARA 816 post; and CONTRACT vol 9(1) (Reissue) PARA 758.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/763. Conveyance of land contracted to be sold.

763. Conveyance of land contracted to be sold.

The personal representatives of a person at whose death there was subsisting an enforceable contract for the sale of his freehold interest in any land¹ have power and are bound to convey the land for all their deceased's estate and interest in it².

1 See *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881; and SALE OF LAND vol 42 (Reissue) PARA 202.

2 See the Administration of Estates Act 1925 s 2 (as amended); and PARA 363 ante. Where the vendor has received the entire purchase price before his death he becomes a bare trustee of the legal estate for the purchaser: see *Re Cumming* (1869) 5 Ch App 72; *Re Colling* (1886) 32 ChD 333, CA. As to sale of land generally see SALE OF LAND.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/764. Effect on building contract of employer's death.

764. Effect on building contract of employer's death.

The personal representatives of an employer are entitled to the benefit of the performance of a building contract, but, on the other hand, they are liable to the contractor for the price. If a building is being erected under a building contract made with the deceased upon land belonging to him at the time of his death, a devisee of the land is entitled, subject to the terms of the will, to require that the cost of completing the building in accordance with the contract

be paid by the personal representatives out of the deceased's real and personal estate applicable to the discharge of his debts and liabilities¹.

1 *Re Rushbrook's Will Trusts, Allwood v Norwich Diocesan Fund and Board of Finance* [1948] Ch 421, [1948] 1 All ER 932; *Holt v Holt* (1694) 2 Vern 322; *Cooper v Jarman* (1866) LR 3 Eq 98; *Re Day, Sprake v Day* [1898] 2 Ch 510; but cf *Ahmed Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624, [1938] 3 All ER 106, PC. As to the liability of the deceased's real and personal estate for debts and liabilities see the Administration of Estates Act 1925 s 34(3); and PARA 416 et seq ante. As to joint contractors see PARA 779 post. As to the incidence of benefit and liability on a building contract as between a specific devisee and residuary legatees see *Re Day's Will Trusts, Lloyds Bank Ltd v Shafe* [1962] 3 All ER 699, [1962] 1 WLR 1419; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 595.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/765. Effect on building contract of contractor's death.

765. Effect on building contract of contractor's death.

On the death of a building contractor before he has completed his contract his personal representatives are bound to perform the contract¹ unless the contractor was employed owing to some special personal qualification², and are entitled to recover payment³. If the contractor's personal representative enters into a fresh or supplementary contract in his capacity as such he will be personally liable on the contract, but may bring an action on it in his representative capacity, and this right of action, if accrued, will pass to an administrator de bonis non on the death of the original personal representative⁴.

Where one of several joint contractors dies, his personal representatives are entitled to share in the contract, and to have their rights as between themselves and their joint contractors ascertained on its completion, and cannot, without their consent, be bought out at a valuation⁵.

1 Fitzherbert's La Graunde Abridgement, Barre, pl 60 (1453), cited by Coke CJ in *Quick and Harris v Ludborrow* (1615) 3 Bulst 29 at 30.

2 *Siboni v Kirkman* (1836) 1 M & W 418 at 422-423. As to the termination on death of contracts founded on personal considerations see PARA 762 ante. As to non-assignability of obligations under personal building contracts see further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(2) (Reissue) PARAS 356-358.

3 *Marshall v Broadhurst* (1831) 1 Cr & J 403.

4 *Moseley v Rendell* (1871) LR 6 QB 338. As to administration de bonis non see PARA 201 ante.

5 *McClean v Kennard* (1874) 9 Ch App 336. See also *Ambler v Bolton* (1872) LR 14 Eq 427.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/766. Tax liabilities.

766. Tax liabilities.

The personal representatives of a person who dies chargeable to tax are liable for the income tax¹ and any penalties², and for capital gains tax³, charged on the deceased, and may deduct any payments made out of the deceased's assets and effects⁴. Where the deceased would have become chargeable to income tax had he not died, the tax which would have been so chargeable is to be assessed and charged on his personal representatives, and is a debt due from and payable out of his estate⁵.

Personal representatives are liable for inheritance tax on a chargeable transfer made on the deceased's death so far as the tax is attributable to property which was not comprised in a settlement immediately before his death, or was so comprised and consists of land in the United Kingdom which devolves upon or vests in his representatives⁶.

On the death of a person who is a taxable person for the purposes of value added tax any person carrying on his business may be treated as a taxable person until some other person is registered in respect of it⁷.

There are special statutory provisions for the taxation of estates in the course of administration⁸.

1 See the Taxes Management Act 1970 s 74(1); and INCOME TAXATION vol 23(2) (Reissue) PARA 1246.

2 The Crown's claim for penalties falls within the expression 'all causes of action' in the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended) (see PARAS 814-815 post) and accordingly survives the taxpayer's death: *A-G v Canter* [1939] 1 KB 318, [1939] 1 All ER 13, CA.

3 See the Taxes Management Act 1970 ss 74(1), 77(1) (as amended); and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 418. See also the Taxation of Chargeable Gains Act 1992 s 65 (as amended); and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 109.

4 See the Taxes Management Act 1970 s 74(1); and INCOME TAXATION vol 23(2) (Reissue) PARA 1246.

5 See the Income and Corporation Taxes Act 1988 ss 60(4) (as substituted), 113(6) (as amended); and INCOME TAXATION vol 23(1) (Reissue) PARA 151.

6 Inheritance Tax Act 1984 s 200(1)(a): see INHERITANCE TAXATION vol 24 (Reissue) PARA 644. The personal representative's liability for inheritance tax is an original liability: *IRC v Stannard* [1984] 2 All ER 105, [1984] 1 WLR 1039.

7 See the Value Added Tax Regulations 1995, SI 1995/2518, reg 9 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 79. As to assessments after death see the Value Added Tax Act 1994 s 77(5); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 299.

⁸ See the Income and Corporation Taxes Act 1988 Pt XVI (ss 695-702) (as amended)); and INCOME TAXATION vol 23(2) (Reissue) PARA 1531 et seq.

UPDATE

766 Tax liabilities

NOTE 5--Income and Corporation Taxes Act 1988 ss 60(4), 113(6) repealed: Income Tax (Trading and Other Income) Act 2005 Sch 3.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/767. Personal statutory obligations.

767. Personal statutory obligations.

A statutory obligation which is purely personal, and for the enforcement of which a statutory mode is provided, for example the liability of the putative father under an affiliation order, ceases when, by the person's death, the statutory mode of enforcing payment has ceased, and no claim can be maintained against his personal representatives either for arrears or for future payments¹. Accordingly, payment of arrears of maintenance is not enforceable against the personal representative of a deceased husband².

1 *Re Harrington, Wilder v Turner* [1908] 2 Ch 687. Affiliation proceedings were abolished by the Family Law Reform Act 1987 s 17 but without prejudice to the operation of existing orders: see s 33(2), Sch 3 para 6. Order for secured periodical payments which bind the payer's estate may now be made under the Children Act 1989 s 15 (as amended), Sch 1 para 1(2)(b): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539. There may also be a claim for family provision: see PARA 665 et seq ante.

2 *Re Hedderwick, Morton v Brinsley* [1933] Ch 669.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/768. Incomplete gifts.

768. Incomplete gifts.

In general a gift which has been promised but is not secured by an instrument under seal or, in the case of a chattel, completed by delivery is unenforceable either against the promisor or against his personal representatives, but the circumstances may be such as to make the promisor or his personal representatives liable to implement his promise¹, and an imperfect gift may be perfected by the donor appointing the donee to be his executor². The subject of incomplete gifts is considered elsewhere in this work³.

1 See eg ESTOPPEL vol 16(2) (Reissue) PARAS 1059, 1082, 1089.

2 See PARA 22 ante.

3 See GIFTS vol 52 (2009) PARA 267 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/769. Contracts to leave property by will.

769. Contracts to leave property by will.

A person with whom a contract is made by a testator to leave property by will may, if the contract is made for consideration and is otherwise enforceable, have a maintainable claim against the testator's estate if he has not fulfilled his promise in his will¹, but the doctrine of part performance² will not be strained so as to give effect to an oral promise where there is no such memorandum in writing as is required by law³.

¹ See *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC; and WILLS vol 50 (2005 Reissue) PARA 269.

² In relation to contracts for the sale or other disposition of an interest in land by will made on or after 27 September 1989 the doctrine of part performance is now abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and WILLS vol 50 (2005 Reissue) PARA 319. As to the doctrine of part performance see CONTRACT vol 9(1) (Reissue) PARAS 922-923; SPECIFIC PERFORMANCE.

³ See *Maddison v Alderson* (1883) 8 App Cas 467, HL (understanding between the testator and another, but no enforceable contract to leave by will a life estate in land); and WILLS vol 50 (2005 Reissue) PARA 319. As to the court's power to order provision for dependants where the deceased has contracted to leave property by will see PARA 688 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/770. Original lessee's personal representative.

770. Original lessee's personal representative.

The personal representative of an original lessee under a lease granted before 1 January 1996¹ is liable in his representative capacity, to the extent of assets, upon the covenants contained in the lease for the residue of the term, whether the term was assigned by the lessee in his lifetime² or by the representative after his death³. Upon a conveyance, however, he may avail himself of the benefit of statutory protection⁴. On the assignment of a lease granted on or after 1 January 1996 the original lessee or his personal representative will cease to be liable on the tenant's covenants (and cease to be entitled to enforce the landlord's covenants) on the assignment⁵.

¹ As to leases granted after 1 January 1996 see the text to note 5 infra.

² *Brett v Cumberland* (1619) Cro Jac 521; *Coghill v Freelove* (1690) 3 Mod Rep 325. As to a lessee's liability on covenants after assignment and the nature of that liability see *Re Downer Enterprises Ltd* [1974] 2 All ER 1074, [1974] 1 WLR 1460.

³ *Helier v Casebert* (1665) 1 Lev 127; *Pitcher v Tovey* (1692) 4 Mod Rep 71 at 76; *Youngmin v Heath* [1974] 1 All ER 461, [1974] 1 WLR 135, CA.

⁴ See PARA 408 ante.

⁵ See the Landlord and Tenant (Covenants) Act 1995 ss 5, 31(1); the Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995, SI 1995/2963; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 554 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/771. Personal representative of assignee of a term.

771. Personal representative of assignee of a term.

Where the deceased was an assignee of the term, his estate remains liable upon the covenants so long as the term is vested in his personal representative. Where the lease is an onerous one, it will normally be the duty of the representative, as he cannot disclaim it¹, to offer to surrender

it to the lessor, and, in the event of his refusal to accept a surrender, to find an assignee, even if he is without means².

1 See *Rubery v Stevens* (1832) 4 B & Ad 241.

2 *Reid v Lord Tenterden* (1833) 4 Tyr 111; *Rowley v Adams* (1839) 4 My & Cr 534. As to the right of an assignee to assign over to a person without means see *Taylor v Shum* (1797) 1 Bos & P 21; *Onslow v Corrie* (1817) 2 Madd 330; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 563.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/772. Entry a condition of personal liability under lease.

772. Entry a condition of personal liability under lease.

A personal representative can only be sued in his personal capacity if he has entered upon the deceased's leasehold¹, but the entry by one of several personal representatives does not render his co-representatives liable to an action for use and occupation². A covenant to enter is binding on the personal representative notwithstanding his fiduciary capacity³. Where the representative has entered upon the deceased's leasehold the lessor has the option to sue him either in his representative capacity or in his personal capacity as assignee of the lease; and in the latter case judgment goes against him *de bonis propriis*⁴.

1 *Wollaston v Hakewill* (1841) 3 Man & G 297; *Rendall v Andreae* (1892) 61 LJQB 630; *Re Owers, Public Trustee v Death* [1941] Ch 389, [1941] 2 All ER 589. A person who enters on the deceased's leasehold may by his intermeddling with the estate become an executor *de son tort*, and by his conduct be estopped from denying that he is assignee of the term and liable accordingly on the covenants: see *Stratford-upon-Avon Corp v Parker* [1914] 2 KB 562, DC; and ESTOPPEL vol 16(2) (Reissue) PARA 1038. See also PARA 53 ante; and *Fielding v Cronin* (1885) 16 LR Ir 379, CA.

2 *Nation v Tozer* (1834) 1 Cr M & R 172. As to joint representation see PARA 345 ante. As to the executor *de son tort* see PARA 53 ante.

3 *Lloyds Bank Ltd v Jones* [1955] 2 QB 298, [1955] 2 All ER 409, CA.

4 See the cases cited in note 1 supra.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/773. Limitation of personal liability.

773. Limitation of personal liability.

If the personal representative is sued as assignee of the lease for the rent accrued during the time he was in possession, he is entitled to set up by way of defence that he is only assignee as personal representative, and that the profits or yearly value of the property amount to a sum less than the rent¹. In such a case the personal liability of the representative is limited to the profits or yearly value of the property; it is not confined to the actual profits he may have received, but extends to the profits which he might have received if he had used due diligence².

The representative cannot limit his personal liability where an action is brought against him as assignee of the lease for breach of a covenant to repair³.

1 *Re Bowes, Earl of Strathmore v Vane, Norcliffe's Claim* (1887) 37 ChD 128 at 133; *Billinghurst v Speermen* (1695) 1 Salk 297; *Buckley v Pirk* (1710) 1 Salk 316.

2 *Re Bowes, Earl of Strathmore v Vane, Norcliffe's Claim* (1887) 37 ChD 128 at 133; *Whitehead v Palmer* [1908] 1 KB 151; *Rubery v Stevens* (1832) 4 B & Ad 241; *Hopwood v Whaley* (1848) 6 CB 744. It is submitted that *Remnant v Bremridge* (1818) 8 Taunt 191 is no longer good law.

3 *Tremeere v Morison* (1834) 1 Bing NC 89; *Sleap v Newman* (1862) 12 CBNS 116; *Rendall v Andraee* (1892) 61 LJQB 630.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/774. Remedy by distress.

774. Remedy by distress.

Where the lessee dies before the expiration of the term, and his personal representative continues in possession for the remainder, a distress may be taken for rent due for any part of the term, including arrears accrued due during the lessee's lifetime¹.

1 Went Off Ex (14th Edn) 291; *Braithwaite v Cooksey* (1790) 1 Hy BI 465. As to distress generally see DISTRESS vol 13 (2007 Reissue) PARA 901 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/775. Specific performance of agreement for a lease.

775. Specific performance of agreement for a lease.

Specific performance may be ordered against the personal representative of a person who has agreed to accept a lease¹, but only if the lease is so framed as not to impose a personal liability upon the representative².

1 *Phillips v Everard* (1831) 5 Sim 102. As to specific performance see generally SPECIFIC PERFORMANCE.

2 *Stephens v Hotham* (1855) 1 K & J 571.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/776. Settled leasehold.

776. Settled leasehold.

Where leasehold property is settled by will the tenant for life is bound as between himself and the testator's estate to perform the covenants and indemnify the estate¹, although he is not liable for repairs necessary at the commencement of his interest or in respect of breaches of covenant which had arisen before the testator's death². Although as between himself and the testator's estate the tenant for life may be under an obligation to indemnify the estate, the remainderman cannot enforce that obligation after the death of the tenant for life against his estate³.

1 *Re Kingham, Kingham v Kingham* [1897] 1 IR 170; *Re Betty, Betty v A-G* [1899] 1 Ch 821 (dissenting from *Re Baring, Jeune v Baring* [1893] 1 Ch 61; *Re Tomlinson, Tomlinson v Andrew* [1898] 1 Ch 232); *Re Gjerns, Cooper v Gjerns* [1899] 2 Ch 54. See also *Re Redding, Thompson v Redding* [1897] 1 Ch 876.

2 *Re Courtier, Coles v Courtier, Courtier v Coles* (1886) 34 ChD 136, CA, commenting upon *Re Fowler, Fowler v Odell* (1881) 16 ChD 723.

3 *Re Parry and Hopkin* [1900] 1 Ch 160. Where, however, an equitable tenant for life, after the death of the last surviving trustee, had entered into receipt of the rents, her estate was held liable for a failure to carry out an obligation to repair imposed by the trust instrument upon the trustees: *Re Field, Sanderson v Young* [1925] Ch 636. See further SETTLEMENTS vol 42 (Reissue) PARA 996.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/777. Settled freehold.

777. Settled freehold.

Although the estate of a legal tenant for life of freehold land¹ was not liable at common law for waste, permissive or voluntary², yet where there is an express direction in the instrument creating the settlement that the property is to be kept in repair by the tenant for life, failure to comply with that obligation raises in equity a liability against the estate of the deceased tenant for life³. This liability is equitable, and not consequent upon a tort. Therefore the limitation of time within which an action had once to be brought against personal representatives for a tort⁴ did not apply⁵.

The estate of a tenant for life is liable to make good to the persons entitled under the settlement any damages occasioned by his default in complying with his statutory obligations to maintain and insure improvements⁶.

1 New settlements cannot be created under the Settled Land Act 1925 after 1996 although there are savings in respect of settlements in existence at that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(1); and SETTLEMENTS vol 42 (Reissue) PARA 675 et seq. See also PARA 229 note 2 ante.

2 *Phillips v Homfray* (1883) 24 ChD 439 at 455, CA, per Bowen LJ (on appeal sub nom *Phillips v Fothergill* (1886) 11 App Cas 466, HL); *Re Cartwright, Avis v Newman* (1889) 41 ChD 532, following *Gibson v Wells* (1805) 1 Bos & PNR 290; *Herne v Bembow* (1813) 4 Taunt 764; *Powys v Blagrove* (1854) 4 De GM & G 448, explaining dicta in *Yellowly v Gower* (1855) 11 Exch 274; *Woodhouse v Walker* (1880) 5 QBD 404 at 407. As to waste see SETTLEMENTS vol 42 (Reissue) PARA 986 et seq.

3 *Re Williamses, Andrew v Williamses* (1885) 54 LT 105, CA; *Re Field, Sanderson v Young* [1925] Ch 636. See also *Messenger v Andrews* (1828) 4 Russ 478; *Gregg v Coates, Hodgson v Coates* (1856) 23 Beav 33. The equitable liability for permissive waste is confined to cases where there is an obligation to keep in repair: *Re Cartwright, Avis v Newman* (1889) 41 ChD 532.

4 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(3) (repealed).

5 Jay v Jay [1924] 1 KB 826.

6 See the Settled Land Act 1925 s 88(5); and SETTLEMENTS vol 42 (Reissue) PARA 964.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/778. Shares and underwriting agreements.

778. Shares and underwriting agreements.

The estate of a deceased member of a company regulated by the Companies Act 1985 remains subject to the burdens of membership¹.

The liability on a contract to apply for shares under an underwriting agreement is enforceable against the personal representatives of the deceased underwriter².

1 See *Re Agriculturist Cattle Insurance Co, Baird's Case* (1870) 5 Ch App 725 at 735; *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456 at 465, CA; and COMPANIES vol 15 (2009) PARA 1145. As to the liability for devastavit in this connection see PARA 407 ante; and COMPANIES vol 15 (2009) PARA 1145. As to the transmission of shares on death and the registration of the personal representatives as members see COMPANIES vol 14 (2009) PARA 434. As to voting without registration see COMPANIES vol 14 (2009) PARA 653. As to the qualification of a personal representative to be a director see COMPANIES vol 14 (2009) PARA 497.

2 *Re Worthington, ex p Pathé Frères* [1914] 2 KB 299, CA; *Warner Engineering Co Ltd v Brennan* (1913) 30 TLR 191, DC; *Beardmore & Co Ltd v Barry* 1928 SC 101. As to underwriting agreements see COMPANIES vol 15 (2009) PARA 1151.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/779. Joint contracts.

779. Joint contracts.

The obligation upon a joint contract devolves upon the survivors, and the estate of a deceased joint contractor is under no primary liability¹.

The question whether a particular promise is joint or several, or both joint and several, is one of construction². A bond, though joint in form, and though it would be construed as creating a joint obligation only at law, may in equity, in the administration of the estate of a deceased obligor, be construed as joint and several, especially in the case of a bond given by partners, or in substitution for an antecedent joint and several liability³.

As between the co-contractors, where the joint contract is for the benefit of all, there is an implied condition that each will contribute an aliquot part to the contractor who pays the debt, and an action for contribution will lie against the personal representative of a deceased co-contractor⁴. It cannot, however, be stated as a universal proposition that in all cases where two or more persons jointly employ a third there is an implied condition for all to contribute rateably among themselves so as to bind the personal representative of a deceased co-contractor; each case turns on its own facts⁵.

1 See CONTRACT vol 9(1) (Reissue) PARA 1085. The executor of a deceased joint contractor cannot, therefore, either by payment of interest (*Slater v Lawson* (1830) 1 B & Ad 396) or by acknowledgment (*Read v Price* [1909] 1 KB 577; affd [1909] 2 KB 724, CA) prevent the debt being statute-barred as against his co-contractors.

2 As to rules of construction in respect of joint and several promises see CONTRACT vol 9(1) (Reissue) PARA 1083.

3 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 111.

4 *Ashby v Ashby* (1827) 7 B & C 444; *Batard v Hawes* (1853) 2 E & B 287. As to rights of contribution generally see EQUITY vol 16(2) (Reissue) PARAS 458, 459; RESTITUTION vol 40(1) (2007 Reissue) PARA 80 et seq. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1165 et seq.

5 *Prior v Hembrow* (1841) 8 M & W 873 at 889 per Alderson B. As to the interest in the deceased's property of personal representatives under a joint representation see PARA 345 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/780. Partnership debts.

780. Partnership debts.

The separate estate of a deceased partner is severally liable in due course of administration for all debts and obligations of the firm incurred while he was a partner, so far as they remain unsatisfied, but subject to the prior payment of his separate debts¹. Joint covenants by partners as lessees are not, however, construed as joint and several after the death of one partner so as to render his estate liable for breaches occurring after his death². The partnership creditor is entitled to prove in the administration of the deceased partner's estate after the separate debts are paid without first proving that the surviving partner is insolvent, and without being obliged first to have recourse to the joint assets³; but it is necessary that the surviving partner should be present at the taking of the accounts of the deceased partner's estate⁴. Where there are no partnership assets, the joint creditors come in *pari passu* with the separate creditors⁵.

1 Partnership Act 1890 s 9. See also PARTNERSHIP vol 79 (2008) PARA 74. The Partnership Act 1890 did not enlarge the liabilities for which, before the Act, the estate of a deceased partner was responsible: *Friend v Young* [1897] 2 Ch 421. The Partnership Act 1890 s 9 declares and settles the principle, which had long been acted upon in equity, that although partners were at law only jointly liable on contracts, a surviving partner could, in equity, obtain contribution from the estate of a deceased partner for liabilities to which he was subject as such survivor, and that unpaid creditors might avail themselves directly of the equity which the surviving partner could thus insist upon: *Kendall v Hamilton* (1879) 4 App Cas 504, HL. The fact that the remedy was enforced in equity at the instance of creditors of the firm has in some old cases been treated as an adoption by the former Court of Chancery of the rule of the *lex mercatoria* that partnership debts create a several as well as joint liability (see *Devaynes v Noble, Sleech's Case* (1816) 1 Mer 529 at 564), but this view was rejected by the House of Lords: see *Kendall v Hamilton* supra at 538. As to the circumstances which determine whether the remedy against the deceased partner's estate is or is not barred see *Vulliamy v Noble* (1817) 3 Mer 593 at 619; *Way v Bassett* (1845) 5 Hare 55; *Brown v Gordon* (1852) 16 Beav 302; *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572; *Wilkinson v Henderson* (1833) 1 My & K 582; *Ex p Kendall* (1811) 17 Ves 514 at 525; *Thorpe v Jackson* (1837) 2 Y & C Ex 553 (which shows that the surviving partner is a necessary party to the action); *Braithwaite v Britain* (1836) 1 Keen 206; *Winter v Innes* (1838) 4 My & Cr 101; *Cowell v Sikes* (1827) 2 Russ 191; cf *Mills v Boyd* (1842) 6 Jur 943; and see EQUITY vol 16(2) (Reissue) PARA 465. As regards the partners where there is in equity no survivorship of property there is no survivorship of the liability: see *Beresford v Browning* (1875) 1 ChD 30 at 34, CA, per James LJ; affg LR 20 Eq 564. Cf *Wilmer v Currey* (1848) 2 De G & Sm 347.

2 *Clarke v Bickers* (1845) 14 Sim 639.

3 *Wilkinson v Henderson* (1833) 1 My & K 582; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA; *Re Doetsch, Matheson v Ludwig* [1896] 2 Ch 836 at 839, where it was held that this rule of procedure applied to

the case of a foreign firm having a place of business here (one of the partners domiciled in England dying and leaving assets in England) notwithstanding that the law of the foreign country differed from that of England.

4 *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA.

5 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 1242-1243.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/781. Discharge of partnership liability.

781. Discharge of partnership liability.

The estate of a deceased partner may be discharged by direct payments, or by dealings of the creditor with the continuing partners operating as payment of the joint debt¹. It may also be discharged by the acceptance by the creditor of the security of the continuing partners in lieu of the original partnership liability², or by novation of the original contract with the continuing partners³. But the circumstance that the creditor continues his transactions with the survivors, and, at their request, forbears for some years to enforce payment⁴, or receives interest on his debt from the surviving partners⁵, or obtains judgment against them⁶, is not of itself sufficient to discharge the deceased partner's estate.

1 *Winter v Innes* (1838) 4 My & Cr 101 at 110.

2 *Thompson v Percival* (1834) 5 B & Ad 925.

3 *Re Head, Head v Head (No 2)* [1894] 2 Ch 236, CA (distinguishing *Re Head, Head v Head* [1893] 3 Ch 426); *Bilborough v Holmes* (1876) 5 ChD 255.

4 *Winter v Innes* (1838) 4 My & Cr 101 at 110.

5 *Harris v Farwell* (1846) 13 Beav 403.

6 *Jacomb v Harwood* (1751) 2 Ves Sen 265 at 267; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/782. Wrongful acts of co-partner.

782. Wrongful acts of co-partner.

Where a firm becomes liable for the wrongful acts or omissions of a partner, or for the misapplication of money or property of a third person, every partner is liable both jointly and severally¹. In such a case the liability of a deceased partner devolves upon his representatives. Where the wrongful act is committed after the death of a partner, no liability is imposed upon his estate².

1 See the Partnership Act 1890 ss 10-12; and PARTNERSHIP vol 79 (2008) PARA 75; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL.

- 2 *Devaynes v Noble, Houlton's Case* (1816) 1 Mer 529 at 616; *Friend v Young* [1897] 2 Ch 421.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/783. Partnership debts contracted after death.

783. Partnership debts contracted after death.

The estate of a deceased partner is not liable for debts of his late firm contracted after his death¹; nor does the continued use of the old firm name, or of the deceased partner's name as part of it, of itself impose liability upon his representative or estate for such debts².

- 1 See the Partnership Act 1890 s 36(3); and PARTNERSHIP vol 79 (2008) PARA 27.

- 2 See *ibid* s 14(2); and PARTNERSHIP vol 79 (2008) PARA 27. As to the liability of a person who holds himself out as a partner see PARTNERSHIP vol 79 (2008) PARAS 27-28.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/784. Guarantors.

784. Guarantors.

The effect of the death of the surety in a contract of guarantee depends on the nature and terms of the particular contract, but the general principle has been established that the guarantee will not be determined by the death of the surety of which the creditor has no notice¹.

- 1 See *Ashby v Day* (1885) 33 WR 631; *affd* (1886) 54 LT 408, CA. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1202-1204.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/785. Implied obligations.

785. Implied obligations.

It is not only where there is an express contract that an action grounded on some default of the person whose personal representative is sued can be maintained: if the position of the parties is such that the law would imply a contract from that position, then the representative may still be held liable¹. There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken one to

another². Familiar instances are those of common carriers and bailees³, and those arising out of the relation of solicitor and client⁴.

1 *Batthyany v Walford* (1887) 36 ChD 269 at 279, CA, per Cotton LJ.

2 *Batthyany v Walford* (1887) 36 ChD 269, CA.

3 *Morgan v Ravey* (1861) 6 H & N 265. As to bailees see BAILMENT. As to common carriers see generally CARRIAGE AND CARRIERS vol 7 (2008) PARAS 1, 3 et seq.

4 *Wilson v Tucker* (1822) 3 Stark 154; *Blyth v Fladgate*, *Morgan v Blyth*, *Smith v Blyth* [1891] 1 Ch 337; *Davies v Hood* (1903) 88 LT 19; and see *Knights v Quarles* (1820) 2 Brod & Bing 102. As to the relationship between solicitor and client see LEGAL PROFESSIONS vol 66 (2009) PARA 763 et seq.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(1) LIABILITY FOR DECEASED'S OBLIGATIONS/786. Breach of trust.

786. Breach of trust.

The liability of a trustee for a breach of trust survives against his personal representative¹, whether the loss is occasioned by default on his part or by his act², and even though the consequences do not occur until after his death³. The personal representative's liability originates from and depends entirely on the deceased's liability, so the representative cannot rely upon any limitation period in answer to the claim which the deceased himself could not have set up⁴. An action for breach of trust may be brought against the surviving trustees without joining the representatives of a deceased trustee⁵. Where the action is brought against the representatives of the last surviving trustee, new trustees must be appointed so that the trust estate may be represented before the court⁶.

1 *Adair v Shaw* (1803) 1 Sch & Lef 243 at 272; *Lord Montford v Lord Cadogan* (1810) 17 Ves 485 at 489; *Walsham v Stainton* (1863) 1 De GJ & Sm 678; *Concha v Murrieta*, *De Mora v Concha* (1889) 40 ChD 543, CA (revsd on the facts sub nom *Concha v Concha* [1892] AC 670, HL); *Re Wassell*, *Wassell v Leggatt* [1896] 1 Ch 554; *Re Franklyn*, *Franklyn v Franklyn* (1913) 30 TLR 187, CA. As to breach of trust see TRUSTS vol 48 (2007 Reissue) PARA 1084 et seq.

2 *Devaynes v Robinson* (1857) 24 Beav 86 at 95.

3 *Grayburn v Clarkson* (1868) 3 Ch App 605.

4 *Brittlebank v Goodwin* (1868) LR 5 Eq 545, following dicta in *Baker v Martin* (1832) 5 Sim 380; *Story v Gape* (1856) 2 Jur NS 706; *Obee v Bishop* (1859) 1 De GF & J 137 at 141, and dissenting from *Dunne v Doran* (1844) 13 I Eq R 545; *Brereton v Hutchinson* (1853) 2 I Ch R 648; affd (1854) 3 I Ch R 361. As to limitation periods see LIMITATION PERIODS.

5 *Re Harrison*, *Smith v Allen* [1891] 2 Ch 349.

6 *Re Jordan*, *Hayward v Hamilton* [1904] 1 Ch 260.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(i) Liability to Third Parties/787. Personal representative's own contracts.

(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS

(i) Liability to Third Parties

787. Personal representative's own contracts.

A personal representative is personally liable upon his own contracts¹ and cannot limit his liability to the extent of assets in his hands. Accordingly, upon counts for goods sold and delivered and work and labour done, he can only be charged personally, and the only possible judgment is *de bonis propriis*². A claim can, however, be maintained against him in his representative character where the consideration for his promise is a contract or transaction with his testator³.

Representatives of a deceased partner who are entitled to profits, but who never interfere in the business, are not liable as partners in the firm⁴.

1 As to the liabilities of an executor *de son tort* see PARA 59 ante. As to the liability of a personal representative who employs an agent see PARA 469 ante.

2 *Farhall v Farhall* (1871) 7 Ch App 123 at 127; *Dowse v Coxe* (1825) 3 Bing 20 (revsd on other grounds sub nom *Biddell v Dowse* (1827) 6 B & C 255); *Powell v Graham* (1817) 7 Taunt 580 at 585.

3 *Corner v Shew* (1838) 3 M & W 350; *Farhall v Farhall* (1871) 7 Ch App 123 at 128. As to the liability of a representative in carrying on his testator's business see PARA 458 ante.

4 *Holme v Hammond* (1872) LR 7 Exch 218. As to the liability of persons holding themselves out as partners see PARTNERSHIP vol 79 (2008) PARAS 24-28.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(i) Liability to Third Parties/788. Consideration for promise to answer damages out of own estate.

788. Consideration for promise to answer damages out of own estate.

Like all other agreements not under seal¹, a promise by a personal representative to answer damages out of his own estate² is only enforceable in contract if given for valuable consideration³, such as giving time for payment⁴, or undertaking to pay interest on a debt not bearing interest⁵. Where the agreement is an instrument, such as a promissory note, which *prima facie* imports a consideration and may induce forbearance, it is not necessary to give evidence of consideration from elsewhere⁶. There can, of course, be no forbearance to sue a person who has not actually taken out administration⁷.

1 See CONTRACT vol 9(1) (Reissue) PARA 727; DEEDS AND OTHER INSTRUMENTS.

2 There is no need for a note or memorandum in writing for such a promise: see the Statute of Frauds (1677) s 4 (as amended); and PARA 393 note 2 ante.

3 *Reech v Kennegal* (1748) 1 Ves Sen 123; *Rann v Hughes* (1778) 7 Term Rep 350n, HL; *Jones v Tanner* (1827) 7 B & C 542. As to consideration see CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

4 *Davis v Rayner* (1671) 2 Lev 3; *Hawes v Smith* (1675) 2 Lev 122.

5 *Bradly v Heath* (1830) 3 Sim 543; *Jones v Ashburnham* (1804) 4 East 455; *Childs v Monins* (1821) 2 Brod & Bing 460.

6 *Ridout v Bristow* (1830) 1 Cr & J 231.

7 *Nelson v Serle* (1839) 4 M & W 795, Ex Ch.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(i) Liability to Third Parties/789. Indorsement of bills of exchange.

789. Indorsement of bills of exchange.

A person who is under an obligation to indorse a bill of exchange in a representative capacity may indorse it in terms which negative personal liability¹. If he fails to indorse it in such terms he is personally liable upon it².

1 Bills of Exchange Act 1882 s 31(5). See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1495, 1607.

2 *King v Thom* (1786) 1 Term Rep 487.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(i) Liability to Third Parties/790. Torts by personal representative.

790. Torts by personal representative.

A personal representative is, of course, personally responsible for all torts committed by him, but where the injury has been occasioned by him or by his agents in the reasonable management of the trust estate he is entitled to be indemnified out of the assets¹; and the person injured has the right to be subrogated to the personal representative's indemnity².

1 *Benett v Wyndham* (1862) 4 De GF & J 259; *Re Raybould, Raybould v Turner* [1900] 1 Ch 199; *Flower v Prechtel* (1934) 150 LT 491, CA. As to the right of a personal representative to indemnity from the estate see PARA 437 ante. As to liability in tort generally see TORT.

2 *Re Raybould, Raybould v Turner* [1900] 1 Ch 199. As to the principles of subrogation see EQUITY vol 16(2) (Reissue) PARA 770; and *Re Downer Enterprises Ltd* [1974] 2 All ER 1074 at 1084, [1974] 1 WLR 1460 at 1470 per Pennycuik V-C, where the ambiguity of the expression 'primary liability' is discussed.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(i) Liability to Third Parties/791. Undue delay by deceased solicitor's personal representatives.

791. Undue delay by deceased solicitor's personal representatives.

The extensive powers of the Council of the Law Society to deal with the property of defaulting solicitors¹ are exercisable where the council considers that there has been undue delay on the part of the personal representatives of a deceased solicitor who immediately before his death was practising as a sole solicitor² in connection with that solicitor's practice or in connection with any controlled trust³. Accordingly⁴, on the application of the Law Society, the High Court may order that no payment may be made without the court's leave by any person of any money held by him on behalf of the representatives⁵; the council may resolve that all money held by or on behalf of the representatives is to vest in the Law Society on trust for the persons beneficially entitled to it⁶; the High Court may require a person whom it suspects of holding money on behalf of the representatives to give information as to any such money and the accounts in which it is held to the Law Society⁷; the Law Society may require the representatives, and the High Court on its application may order any person, to produce or deliver to any person appointed by the Law Society all documents in their or his possession in connection with the solicitor's practice or any controlled trusts⁸; and the High Court may on the Law Society's application order mail addressed to the representatives to be redirected to the Law Society or any person appointed by it⁹.

These provisions do not apply where there is a surviving partner, for in that case he is fully responsible.

1 As to these powers see the Solicitors Act 1974 s 35, Sch 1 Pt II. See also LEGAL PROFESSIONS vol 66 (2009) PARAS 890 et seq. As to solicitor-representatives see PARA 40 ante.

2 'Sole solicitor' means a solicitor who is the sole principal in a practice: see *ibid* s 87(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 890.

3 See *ibid* Sch 1 para 1(1)(b); and LEGAL PROFESSIONS vol 66 (2009) PARA 890. 'Controlled trust' means a trust of which the solicitor is a sole trustee or co-trustee only with one or more of his partners or employees; and 'trust' includes an implied or constructive trust and a trust where the trustee has a beneficial interest in the trust property, and also includes the duties incident to the office of a personal representative: s 87(1).

4 The powers referred to are also exercisable in relation to the personal representatives of a deceased solicitor where the Council of the Law Society has reason to suspect dishonesty on their part in connection with that solicitor's practice or in connection with any trust of which that solicitor is or was formerly a trustee: see *ibid* Sch 1 para 1(1)(a)(iii); and LEGAL PROFESSIONS vol 66 (2009) PARA 890.

5 See *ibid* Sch 1 paras 4(2), 5(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 892.

6 See *ibid* Sch 1 paras 4(2), 6(1), (2); and LEGAL PROFESSIONS vol 66 (2009) PARA 892. A copy of the resolution and a notice prohibiting the payment out of any such sums must be served on the representatives: see Sch 1 paras 4(2), 6(3); and LEGAL PROFESSIONS vol 66 (2009) PARA 892.

7 See *ibid* Sch 1 paras 4(2), 8; and LEGAL PROFESSIONS vol 66 (2009) PARA 892.

8 See *ibid* Sch 1 paras 4(2), 9(1)(a), (4), (5); and LEGAL PROFESSIONS vol 66 (2009) PARA 891.

9 See *ibid* Sch 1 paras 4(2), 10(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 893.

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(ii) Liability to Beneficiaries on a Devastavit

792. Nature of a devastavit.

A personal representative in accepting the office accepts the duties of the office, and becomes a trustee in the sense that he is personally liable in equity for all breaches of the ordinary trusts which in courts of equity are considered to arise from his office¹. The violation of his duties of administration is termed a devastavit; this term is applicable not only to a misuse by the representative of the deceased's effects, as by spending or converting them to his own use, but also to acts of maladministration or negligence².

1 *Re Marsden, Bowden v Layland, Gibbs v Layland* (1884) 26 ChD 783 at 789 per Kay J. As to the duty or 'great use' of a trustee to commit judicious breaches of trust see *Perrins v Bellamy* [1899] 1 Ch 797 at 798, CA, per Lindley MR, as corrected in *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373 at 376, PC. As to the liability of a trustee for breach of trust see TRUSTS vol 48 (2007 Reissue) PARA 1084 et seq.

2 Bac Abr, Executors and Administrator (L) 1.

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793. Maladministration.

A personal representative commits a devastavit if, where there is a deficiency of assets, he pays debts otherwise than in their due order to the prejudice of preferred creditors known to him¹; if he makes payments to legatees without providing for debts² or for calls upon shares which have not been fully paid up³; or if he applies the assets in payment of claims which he has no right to satisfy⁴. The representative's duties to get in the estate and invest money in hand have already been considered⁵; a breach of such duties amounts to a devastavit. An executor is also liable for paying a legatee a sum greater than is warranted by the existing state of the assets, but he will not be disallowed a payment made to one of several residuary legatees, because through a subsequent decrease in the value of the assets such a residuary legatee may have received more than the other residuary legatees⁶.

1 See 2 Bl Com (14th Edn) 510, 511. If he has no notice of the preferred debts he will not be liable (see *Harman v Harman* (1686) 2 Show 492; *Re Fludyer, Wingfield v Erskine* [1898] 2 Ch 562 at 565) unless, it seems, he would have had notice if he had advertised: see note 2 infra.

2 See eg *Taylor v Taylor* (1870) LR 10 Eq 477; *Re Bewley's Estate, Jefferys v Jefferys* (1871) 24 LT 177. For the statutory protection given to representatives who advertise for debts see PARA 383 ante. Where the representative fails to advertise it would appear that he cannot rely on mere want of notice of the debt: see *Chelsea Waterworks Co v Cowper* (1795) 1 Esp 275; *Norman v Baldry* (1834) 6 Sim 621; *Smith v Day* (1837) 2 M & W 684; *Hill v Gomme* (1839) 1 Beav 540.

3 See PARA 407 ante.

4 Com Dig, Administration (1) 1; *Shallcross v Wright* (1850) 12 Beav 558; *Re Midgley, Midgley v Midgley* [1893] 3 Ch 282, CA; *Re Rosenthal, Schwarz v Bernstein* [1972] 3 All ER 552, [1972] 1 WLR 1273.

5 See PARA 377 et seq ante.

6 *Lloyd v Lloyd* (1875) 23 WR 787.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(ii) Liability to Beneficiaries on a Devastavit/794. Negligence.

794. Negligence.

A personal representative is guilty of a devastavit where loss occurs to the estate owing to his negligence, as where by his delay in taking proceedings a debtor is enabled to plead the statutory limitations¹, or the debt is lost owing to the debtor's bankruptcy or inability to pay²; or if he allows debts bearing interest to run on when he has assets in hand sufficient to discharge them³. No liability, however, attaches to executors for delay in proving the will⁴. An executor, including the solicitor who drafted the will, may take advantage of an indemnity clause which protects him from his own negligence⁵. An indemnity clause which excludes liability for loss unless caused by actual fraud will exonerate a personal representative from liability for loss unless caused by his own dishonesty no matter how indolent, impudent, lacking in diligence, negligent or wilful his conduct may have been and is not void for repugnancy or on the grounds of public policy⁶.

1 *Hayward v Kinsey* (1701) 12 Mod Rep 568 at 573. As to genuine mistakes made upon legal advice see PARA 803 post. As to negligence generally see NEGLIGENCE.

2 See PARA 377 ante.

3 *Bate v Robins* (1863) 32 Beav 73; *Hall v Hallet* (1784) 1 Cox Eq Cas 134; *Dornford v Dornford* (1806) 12 Ves 127 at 130. A personal representative is not liable for loss arising from his payment of a non-interest-bearing debt before an interest-bearing debt: *Re Stevens, Cooke v Stevens* [1898] 1 Ch 162 at 174, CA, per Chitty LJ.

4 *Re Stevens, Cooke v Stevens* [1897] 1 Ch 422 (affd [1898] 1 Ch 162, CA); *Re Morris, Griffiths, Morris v Morris* (1908) 124 LT Jo 315.

5 *Bogg v Raper* [1998] CLY 4592, CA.

6 *Armitage v Nurse* [1998] Ch 241, [1997] 2 All ER 705, CA. A trustee will be treated as acting dishonestly if he acts in a way which he does not honestly believe to be in the interests of the beneficiaries whether or not he stands to gain or thinks he stands to gain from his actions: *Armitage v Nurse* supra at 251 and 711 per Millett LJ.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(ii) Liability to Beneficiaries on a Devastavit/795. Unremunerated representative a gratuitous bailee.

795. Unremunerated representative a gratuitous bailee.

Where the testator's assets have come into the possession of the personal representative and are afterwards lost to the estate, the equitable rule that the representative stands in the position of a gratuitous bailee, and cannot therefore be charged without some wilful default¹, applies². The person seeking to charge the representative must show that the loss was attributable to his wilful default; it does not rest upon the representative to show that it was not³. A personal representative enjoys the same protection as a trustee against losses incurred by the appointment of an agent, solicitor, banker or stockbroker⁴.

A paid trustee⁵ is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee, and a bank which advertises itself largely in the public press as taking charge of administrations is under a special duty⁶.

1 *Job v Job* (1877) 6 ChD 562; *Jones v Lewis* (1751) 2 Ves Sen 240 at 241; *Little v Governors of County Down Infirmary* [1918] 1 IR 221. The old rule at common law was that the representative was liable for the loss of assets once they had come to his hands: see *Crosse v Smith* (1806) 7 East 246. As to gratuitous bailment see BAILMENT vol 3(1) (2005 Reissue) PARA 6 et seq.

2 See the Trustee Act 1925 ss 30(1), 68(1) PARA (17); and TRUSTS.

3 *Re Brier, Brier v Evison* (1884) 26 ChD 238, CA. See also *Hodges v Smith* [1950] WN 455. As to the measure of diligence demanded of a gratuitous bailee see BAILMENT vol 2 (Reissue) PARA 1815.

4 See the Trustee Act 1925 s 23; and TRUSTS vol 48 (2007 Reissue) PARA 998 et seq. See also *Re Vickery, Vickery v Stephens* [1931] 1 Ch 572. See further PARA 469 ante.

5 As to personal representatives' remuneration see PARA 38 et seq ante.

6 *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139. See also Mervyn Davies 'Liability of the Paid Trustee' 33 Conveyancer and Property Lawyer 179.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(ii) Liability to Beneficiaries on a Devastavit/796. Proof in personal representative's bankruptcy.

796. Proof in personal representative's bankruptcy.

Upon the bankruptcy of the personal representative the person injured by a devastavit may put in a proof¹. Where the bankrupt representative is one of several representatives, the others may prove in his bankruptcy in respect of his devastavit².

1 Toller's Law of Executors (7th Edn) 429.

2 *Re Davis, ex p Courtenay* (1835) 2 Mont & A 227. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 523-524.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(2) LIABILITY FOR PERSONAL REPRESENTATIVE'S OWN ACTS/(ii) Liability to Beneficiaries on a Devastavit/797. Devolution of personal representative's liability.

797. Devolution of personal representative's liability.

Where a person as personal representative¹ of a deceased person, including an executor de son tort², wastes or converts to his own use any part of the deceased's real or personal estate³, and dies, his personal representative is, to the extent of the defaulter's available assets, liable and

chargeable in respect of that waste or conversion in the same manner as the defaulter would have been if living⁴.

1 For the meaning of 'personal representative' see PARA 4 ante.

2 As to the meaning of 'executor de son tort' see PARA 2 ante.

3 For the meaning of 'real estate' see PARA 3 note 1 ante.

4 Administration of Estates Act 1925 s 29. See also *Coward v Gregory* (1866) LR 2 CP 153; and cf *Wilson v Hodson* (1872) LR 7 Exch 84 (see PARA 62 note 3 ante).

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798. Effect of concurrence of party in devastavit.

The concurrence in the act of devastavit of the party suing generally releases the personal representative from liability¹, even though the party concurring derived no benefit from it².

1 *Walker v Symonds* (1818) 3 Swan 1 at 64.

2 *Chillingworth v Chambers* [1896] 1 Ch 685 at 700, CA; *Re Somerese, Somerset v Earl Poulett* [1894] 1 Ch 231, CA; *Fletcher v Collis* [1905] 2 Ch 24, CA. As to the jurisdiction to impound the beneficiary's interest see PARA 807 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(3) LIABILITY FOR CO-REPRESENTATIVE'S ACTS/799. Liability for co-executor's acts.

(3) LIABILITY FOR CO-REPRESENTATIVE'S ACTS

799. Liability for co-executor's acts.

In the absence of any provision to the contrary contained in the will, an executor is chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and is answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other executor¹.

1 See the Trustee Act 1925 s 30(1). The provision refers only to trustees, but trustee is defined so as to include a personal representative: see s 68(1) PARA (17); and PARA 5 ante. Since an administrator is a personal representative this provision covers an administrator: see s 68(1) PARA (9); and PARA 4 ante. See also TRUSTS vol 48 (2007 Reissue) PARAS 602-603.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(3) LIABILITY FOR CO-REPRESENTATIVE'S ACTS/800. Executor's duty to take care.

800. Executor's duty to take care.

It is the duty of executors to watch over and, if necessary, to correct each other's conduct¹, and an executor who stands by and sees a breach of trust committed by his co-executor becomes himself responsible for that breach².

It is not incumbent on one executor by force to prevent money from getting into the hands of another executor³; but if he unnecessarily hands over assets to a co-executor⁴, or unnecessarily does an act which enables his co-executor to obtain sole possession of the assets⁵, he is liable for the loss incurred.

The test of his liability is the necessity of the act. If the act is one which is required by the regular course of business, it is not an unnecessary act⁶. Therefore if money is required for the payment of debts or legacies, one executor is safe in joining in the sale of assets and permitting another executor to receive the proceeds for that purpose; but if he joins in such a sale when the money is not required, and he has no reasonable grounds for believing that it is so required, he is liable for the money so received by his co-executor⁷; and it would appear that he cannot safely entrust his co-executor with the assets for the purpose of handing them over to the residuary legatee⁸.

¹ *Styles v Guy* (1849) 1 Mac & G 422 at 433. As to the right of one of several executors to draw on the estate's bank account see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 833.

² *Booth v Booth* (1838) 1 Beav 125; *Williams v Nixon* (1840) 2 Beav 472.

³ *Langford v Gascoyne* (1805) 11 Ves 333.

⁴ *Townsend v Barber* (1763) 1 Dick 356; *Lincoln v Wright* (1841) 4 Beav 427. See also *Lowe v Shields* [1902] 1 IR 320, CA.

⁵ *Candler v Tillett* (1855) 22 Beav 257 at 263; *Lewis v Nobbs* (1878) 8 ChD 591.

⁶ *Clough v Bond* (1838) 3 My & Cr 490 at 496; *Re Gasquoine, Gasquoine v Gasquoine* [1894] 1 Ch 470, CA.

⁷ *Terrell v Matthews* (1841) 1 Mac & G 433n. See also *Chambers v Minchin* (1802) 7 Ves 186 at 193; *Brice v Stokes* (1805) 11 Ves 319; *Lord Shipbrook v Lord Hinchinbrook* (1810) 16 Ves 477; *Underwood v Stevens* (1816) 1 Mer 712; *Lees v Sanderson* (1830) 4 Sim 28.

⁸ See *Moses v Levi* (1839) 3 Y & C Ex 359. It seems that the position of co-administrators is similar to that of co-executors despite the difference in the origins of the offices: see *Fountain Forestry Ltd v Edwards* [1975] Ch 1 at 14, [1974] 2 All ER 280 at 285 per Brightman J; and PARA 345 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(4) LIABILITY TO ACCOUNT/801. Duty to keep accounts.

(4) LIABILITY TO ACCOUNT

801. Duty to keep accounts.

It is the duty of personal representatives to keep clear and accurate accounts, and always to be ready to render such accounts when called upon to do so¹. It is no excuse that they are inexperienced in keeping accounts, for in that case it would be their duty to employ a competent accountant to keep them². Where they are required by the beneficiaries to furnish accounts, they may demand to have the costs of doing so paid or guaranteed before complying with the request³. A legatee is not entitled to a copy of the accounts at the expense of the estate⁴, but he is entitled to inspect the accounts kept by the representative.

A personal representative is liable to be ordered by the court to account either generally in proceedings for general administration of the estate⁵ or under the court's jurisdiction to order specific accounts⁶.

1 See the Administration of Estates Act 1925 s 25(b) (as substituted) (see PARA 375 ante); *Freeman v Fairlie* (1812) 3 Mer 29 at 43-44; *Pearse v Green* (1819) 1 Jac & W 135 at 140; *Thompson v Dunn* (1870) 5 Ch App 573. See also TRUSTS vol 48 (2007 Reissue) PARA 961.

2 *Wroe v Seed* (1863) 4 Giff 425 at 429.

3 *Re Bosworth, Martin v Lamb* (1889) 58 LJ Ch 432.

4 *Ottley v Gilby* (1845) 8 Beav 602.

5 As regards accounts in administration proceedings see PARA 726 ante.

6 See eg CPR 25.1(1)(n); *Practice Direction--Accounts and Inquiries* (1999) PD 25C; CPR Sch 1 RSC Ord 85 rr 2(3)(a), 5(2)(a). See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante. As to the remedy of account see EQUITY vol 16(2) (Reissue) PARA 449 et seq.

UPDATE

801 Duty to keep accounts

NOTE 6--*Practice Direction--Accounts and Inquiries* PD 25C revoked.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(4) LIABILITY TO ACCOUNT/802. Liability to account for tax purposes.

802. Liability to account for tax purposes.

In addition to his general duty to keep accounts, the personal representative is liable on notice so requiring to provide particulars necessary in connection with income tax incurred in the course of administration of the estate¹. He is also liable, for inheritance tax purposes, to deliver an account of all relevant property and its value² and to account for the tax payable in respect of such property to the extent of the assets which he has received as personal representative or ought to have received but for his own neglect or default³.

1 See the Income and Corporation Taxes Act 1988 s 700(4); and INCOME TAXATION vol 23(2) (Reissue) PARA 1547. As to the personal representative's liability in respect of any income tax and capital gains tax chargeable on the deceased see the Taxes Management Act 1970 ss 74, 77(1) (as amended); and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 418; INCOME TAXATION vol 23(2) (Reissue) PARA 1246.

2 See the Inheritance Tax Act 1984 s 216(1), (3) (as amended); and INHERITANCE TAXATION vol 24 (Reissue) PARA 655.

- 3 See *ibid* ss 200(1)(a), 204(1); and INHERITANCE TAXATION vol 24 (Reissue) PARA 644.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(4) LIABILITY TO ACCOUNT/803. Unauthorised payments by personal representative.

803. Unauthorised payments by personal representative.

Where a personal representative has paid away money to the wrong party, even if in good faith by mistake, or has made unauthorised investments, he is to be treated as having the sum in hand and must replace the capital with interest¹; it is no answer that he has acted on legal advice². He will not be charged, however, with interest at the instance of a beneficiary who was in a position to ask for accounts long before the application³ nor in respect of disbursements honestly made, but disallowed in taking his accounts⁴.

1 *A-G v Köhler* (1861) 9 HL Cas 654; *Re Hulkes, Powell v Hulkes* (1886) 33 ChD 552, dissenting from *Saltmarsh v Barrett (No 2)* (1862) 31 Beav 349.

2 *Doyle v Blake* (1804) 2 Sch & Lef 231 at 243; *Boulton v Beard* (1853) 3 De GM & G 608; *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373, PC; *Marsden v Regan* [1954] 1 All ER 475 at 481, [1954] 1 WLR 423 at 433, CA, per Sir R Evershed MR. However, the court has power to relieve a personal representative from personal liability for breach of trust: see the Trustee Act 1925 ss 61, 68(1) PARA (17); and PARA 806 post. See also TRUSTS vol 48 (2007 Reissue) PARA 1123.

3 *Jones v Morrell* (1852) 2 Sim NS 241.

4 *Re Jones, Christmas v Jones* [1897] 2 Ch 190.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(4) LIABILITY TO ACCOUNT/804. Interest on balances due from personal representative.

804. Interest on balances due from personal representative.

Upon balances found due from a personal representative on taking his accounts, simple interest is charged as a rule¹. The rate at which interest is charged is in the discretion of the court. The current practice is to charge interest at the same rate as is allowed from time to time on money in court on special account (formerly the short-term investment account) though in special cases interest at a higher rate may be awarded in which case it may be appropriate to apportion part of the interest to the capital of the trust fund². In some cases compound interest may be awarded³. Accordingly, where the will contains a trust for accumulation, compound interest will be charged⁴; and where the representative, without actually trading with the assets, had appropriated them for the payment of his own debts or made use of them for his own enjoyment, he was charged with interest at a higher rate⁵. The special case need not necessarily be made before the original judgment in the proceedings⁶.

1 *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674 at 682 per Stirling J.

2 *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 at 546-547, [1980] 2 All ER 92 at 97-98 per Brightman LJ; *Jaffray v Marshall* [1994] 1 All ER 143, [1993] 1 WLR 1285. As to the court's discretion in respect of the rate of interest see PARA 544 ante. As to interest on debts see CPR Sch 1 RSC Ord 44 r 9; and PARA 733 ante. As to the CPR see PARA 37 note 3 ante.

In former years the rate was normally 4%: see *Re Beech, Saint v Beech* [1920] 1 Ch 40; *Re Parry, Brown v Parry* [1947] Ch 23, [1946] 2 All ER 412. The rate was for some time 3%: see *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674. See also *Re Goodenough, Marland v Williams* [1895] 2 Ch 537; *Re Lambert, Middleton v Moore* [1897] 2 Ch 169; *Rowlls v Bebb, Re Rowlls, Walters v Treasury Solicitor* [1900] 2 Ch 107, CA; *Wyman v Paterson* [1900] AC 271 at 279, HL, per the Earl of Halsbury LC and at 289 per Lord Shand; *Re Whiteford, Inglis v Whiteford* [1903] 1 Ch 889.

3 *Rocke v Hart* (1805) 11 Ves 58; *Tebbs v Carpenter* (1816) 1 Madd 290 at 306.

4 *Raphael v Boehm* (1805) 11 Ves 92 at 107 (affd (1807) 13 Ves 407); *Dornford v Dornford* (1806) 12 Ves 127; *Knott v Cottee* (1852) 16 Beav 77; *Gilroy v Stephen* (1882) 30 WR 745; *Re Emmet's Estate, Emmet v Emmet* (1881) 17 ChD 142; *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674. As to trusts for accumulation see TRUSTS vol 48 (2007 Reissue) PARA 685.

5 *Piety v Stace* (1799) 4 Ves 620; *Mousley v Carr* (1841) 4 Beav 49; *Westover v Chapman* (1844) 1 Coll 177. See also *Treves v Townshend* (1783) 1 Bro CC 384; *Berwick-upon-Tweed Corp v Murray* (1857) 7 De GM & G 497 at 519; *Re Jones, Jones v Searle* (1883) 49 LT 91.

6 *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(4) LIABILITY TO ACCOUNT/805. Interest on balances due to personal representative.

805. Interest on balances due to personal representative.

A personal representative who discharges debts due from the estate out of his own money is entitled to be allowed the sums so paid on taking his accounts¹, together with interest². The interest should only be calculated on balances found due to him on the master's certificate³, but the balances may be struck annually⁴, and interest allowed, even though the debts themselves did not carry interest⁵. The representative is not allowed interest on payments made out of his own money for costs⁶.

1 *Spackman v Holbrook* (1860) 2 Giff 198.

2 *Small v Wing* (1730) 5 Bro Parl Cas 66 at 72, HL.

3 *Gordon v Trail* (1820) 8 Price 416. As to the master's certificate see CIVIL PROCEDURE.

4 *Finch v Pescott* (1874) LR 17 Eq 554.

5 *Biggar v Eastwood* (1884) 15 LR Ir 219 at 235-236.

6 *Gordon v Trail* (1820) 8 Price 416; *Lewis v Lewis* (1850) 13 Beav 82.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(5) RELIEF FROM LIABILITY/806. Court's jurisdiction to grant relief.

(5) RELIEF FROM LIABILITY

806. Court's jurisdiction to grant relief.

The court has jurisdiction to relieve a personal representative¹ either wholly or partly from personal liability for a breach of trust where he has acted honestly and reasonably, and ought fairly² to be excused for the breach and for omitting to obtain the court's directions in the matter in which he committed the breach³. Each case must be decided on its own merits, but the court must be satisfied that the representative acted reasonably as well as honestly⁴.

Accordingly, executors may in special circumstances be relieved from liability for failure to get in debts owing to the estate⁵, for making payments to their solicitors in reliance upon their statement that the sums were required for purposes of administration⁶, or for making payments to legatees where they have reason to believe that the estate is solvent⁷.

The granting of this relief is essentially a matter within the discretion of the judge of first instance whose conclusions will not be disturbed on appeal unless it is shown that he misdirected himself or left out something which he ought to have taken into account⁸. The mere fact that the personal representative takes professional advice will not automatically result in relief being given⁹ but acting on the basis of the generally held view of the law is a ground for relief¹⁰. The court will be very slow to grant relief to a paid trustee, such as a bank, which deliberately places itself in a position where its duty conflicts with its interests¹¹.

¹ A personal representative acting under directions given under the court's jurisdiction to determine questions or give other relief available in administration proceedings is, of course, pro tanto protected: see PARA 713 ante. As to concurrence by beneficiaries see PARA 798 ante. As to the statutory protection afforded to personal representatives see PARAS 383, 590 ante. See also PARA 835 post.

² 'Fairly' means in fairness to himself and the other persons affected: see *Marsden v Regan*[1954] 1 All ER 475 at 481, [1954] 1 WLR 423 at 434, CA, per Sir R Evershed MR. As to breach of trust see TRUSTS vol 48 (2007 Reissue) PARA 1084 et seq. As to the committal of judicious breaches of trust see PARA 792 note 1 ante.

³ Trustee Act 1925 ss 61, 68(1) PARA (17); *Re Allsop, Whittaker v Bamford*[1914] 1 Ch 1, CA. See also *Re Evans, Evans v Westcombe*[1999] 2 All ER 777; and TRUSTS vol 48 (2007 Reissue) PARA 1123. The county court has jurisdiction where the amount or value of the estate does not exceed the county court limit: see the Trustee Act 1925 s 63A(1) (as added); and TRUSTS vol 48 (2007 Reissue) PARA 641. As to the county court limit see PARA 275 note 3 ante. As to the statutory relief from liability in respect of the acts of co-representatives see PARA 799 ante. As to losses incurred by the employment of agents see PARA 468 ante. Since, for these purposes, 'trustee' includes a personal representative (see s 68(1) PARA (17); and PARA 5 ante), there is power to relieve for devastavit. As to devastavit see PARA 792 ante.

⁴ *Re Turner, Barker v Ivimey*[1897] 1 Ch 536.

⁵ *Re Roberts, Knight v Roberts* (1897) 76 LT 479, CA; *Re Grindey, Clews v Grindey*[1898] 2 Ch 593, CA.

⁶ *Re Lord De Clifford's Estate, Lord De Clifford v Quilter, Lord De Clifford v Marquis of Lansdowne*[1900] 2 Ch 707, following *Bacon v Bacon* (1800) 5 Ves 331.

⁷ *Re Kay, Mosley v Kay*[1897] 2 Ch 518.

⁸ *Marsden v Regan*[1954] 1 All ER 475 at 482, [1954] 1 WLR 423 at 435, CA, per Sir R Evershed MR.

⁹ *Marsden v Regan*[1954] 1 All ER 475 at 481, [1954] 1 WLR 423 at 434, CA, per Sir R Evershed MR; *Re Evans, Evans v Westcombe*[1999] 2 All ER 777 at 789 per Richard McCombe QC. See also TRUSTS vol 48 (2007 Reissue) PARA 1123.

¹⁰ *Re Wightwick's Will Trusts, Official Trustees of Charitable Funds v Fielding-Ould*[1950] Ch 260 at 266, [1950] 1 All ER 689 at 692 per Wynn-Parry J.

¹¹ *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co*[1964] Ch 303 at 328-329, [1963] 3 All ER 1 at 11, CA, per Willmer LJ.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/10. PERSONAL REPRESENTATIVES' LIABILITIES/(5) RELIEF FROM LIABILITY/807. Indemnity for beneficiary's interest.

807. Indemnity for beneficiary's interest.

The court has jurisdiction where the personal representative commits a breach of trust at the instigation or request or with the consent in writing¹ of a beneficiary, to impound the beneficiary's interest in the trust estate by way of indemnity to the representative². In order to impound this interest it must be shown that the beneficiary knew the facts which would make the act a breach of trust³. The statutory jurisdiction to impound does not operate to deprive the representative of the benefit of the general rule enabling him to offer a good defence to a claim by a party who has concurred in the breach⁴.

1 The instigation or request need not be in writing: see *Griffith v Hughes* [1892] 3 Ch 105, a decision upon the same words in the Trustee Act 1888 s 6 (repealed).

2 See the Trustee Act 1925 ss 62 (as amended), 68(1) PARA (17); and TRUSTS vol 48 (2007 Reissue) PARA 1131. As to county court jurisdiction see PARA 806 note 3 ante.

3 *Re Somerset, Somerset v Earl Poulett* [1894] 1 Ch 231, CA. See also TRUSTS vol 48 (2007 Reissue) PARA 1131.

4 *Fletcher v Collis* [1905] 2 Ch 24, CA. See PARA 798 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(1) PRACTICE AND PROCEDURE/808. Indorsement on claim form; parties.

11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES

(1) PRACTICE AND PROCEDURE

808. Indorsement on claim form; parties.

Where a person claims or is claimed against in a representative capacity, a statement of that capacity must be indorsed on the claim form¹. Where two or more personal representatives are claiming and one of them is debarred or estopped the other or others cannot maintain the claim².

Any proceedings³ may be brought by or against trustees or personal representatives in their capacity as such without joining⁴ any persons beneficially interested in the trust or estate⁵. Personal representatives may be substituted for a person mistakenly joined as a defendant after his death⁶.

1 See CPR 16.2(3), (4). As to the CPR see PARA 37 note 3 ante. Regard should be had to *Chancery Guide* (1999) PARAS 4.5-4.15, App 1. As to beginning or maintaining proceedings by an executor before probate see PARA 31 ante; as to beginning proceedings before a grant of administration see PARA 37 ante. A party wishing to deny another party's right to claim in a representative capacity should do so specifically.

2 See *Brewer v Westminster Bank Ltd*[1952] 2 All ER 650. As to joint representation see PARA 345 ante.

3 This includes proceedings to enforce a security by foreclosure or otherwise: CPR Sch 1 RSC Ord 15 r 14(1).

4 Unless beneficiaries are necessary parties they ought not to be made parties and their costs will be disallowed: see *Re Cooper, Cooper v Vesey*(1882) 20 ChD 611 at 635, CA.

5 CPR Sch 1 RSC Ord 15 r 14(1). This is without prejudice to the court's power to order any person having such an interest to be made a party, or to make a representation order under CPR Sch 1 RSC Ord 15 r 13: CPR Sch 1 RSC Ord 15 r 14(2). Any judgment given or order made in the proceedings binds those persons unless the court in those or other proceedings otherwise orders on the ground that the trustees or representatives did not in fact represent those persons' interests: CPR Sch 1 RSC Ord 15 r 14(1).

6 See CPR Sch 1 RSC Ord 15 r 6A(3); and PARA 226 ante.

UPDATE

808 Indorsement on claim form; parties

TEXT AND NOTES 3-6--CPR Sch 1 RSC Ord 15 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(1) PRACTICE AND PROCEDURE/809. Notice of claim to non-parties.

809. Notice of claim to non-parties.

At any stage in a claim relating to the estate of a deceased person or property subject to a trust¹ the court may, on the application² of any party or of its own motion, direct that notice³ of the claim be served⁴ on any person who is not a party to the claim but who will or may be affected by a judgment in the proceedings⁵. A person served with such a notice may, by acknowledging service⁶, become a party to the claim but if he does not do so he will be bound by any judgment given in the proceedings as if he was a party⁷.

1 CPR Sch 1 RSC Ord 15 r 13A(6). As to the CPR see PARA 37 note 3 ante.

2 An application may be made without notice being served on any other party and must be supported by a witness statement or affidavit stating the grounds of the application: CPR Sch 1 RSC Ord 15 r 13A(2).

3 The notice must be in the specified form and must be issued out of the appropriate office and the copy to be served must be a sealed copy accompanied by a copy of the claim form and of all other statements of case served in the claim, and by a form of acknowledgement of service with such modifications as may be appropriate: CPR Sch 1 RSC Ord 15 r 13A(3).

4 As to service generally see CPR Pt 6. See also CIVIL PROCEDURE.

5 CPR Sch 1 RSC Ord 15 r 13A(1).

6 Acknowledgement must be made within 14 days of service: see CPR Sch 1 RSC Ord 15 r 13A(4).

7 CPR Sch 1 RSC Ord 15 r 13A(4); Administration of Justice Act 1985 s 47(1), (2). If at any time after service the claim form is amended so as substantially to alter the relief claimed, the court may direct that the judgment is not to be binding on non-parties who would otherwise be bound by these provisions unless a further notice together with a copy of the amended claim form is issued and served in the like manner: CPR Sch 1 RSC Ord 15 r 13A(5).

UPDATE

809 Notice of claim to non-parties

TEXT AND NOTES--CPR Sch 1 RSC Ord 15 r 13A revoked: SI 2001/256. See now CPR 19.8A (added by SI 2001/256).

NOTE 4--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(1) PRACTICE AND PROCEDURE/810. Joinder of representative and personal claims.

810. Joinder of representative and personal claims.

Subject to the court's power to order a separate trial of any issue¹ a claimant may claim in one action relief against the same defendant in respect of more than one cause of action if the claimant claims or the defendant is alleged to be liable in the capacity of personal representative of an estate in respect of one or more of the causes of action and in his personal capacity, but with reference to the same estate in respect of all the others². Where the claims cannot be conveniently tried together the court may order separate trials or make such other order as may be expedient³, for example an order confining the claim to those claims which can be conveniently disposed of together.

1 Ie under CPR 3.1(2)(i). As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR 7.3. See also *Padwick v Scott, Re Scott's Estate, Scott v Padwick* (1876) 2 ChD 736 at 743. A claim by a claimant as personal representative of a tenant for life for rent accrued due in the deceased's lifetime cannot be joined with a claim for rent by the claimant in his own right as remainderman in respect of rent accruing due subsequently: *Lord Tredgar v Roberts* [1914] 1 KB 283, CA.

3 See CPR 3.1(2)(i).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(1) PRACTICE AND PROCEDURE/811. Leave to bring or defend proceedings.

811. Leave to bring or defend proceedings.

It is advisable for a personal representative before bringing or defending a claim to obtain the consent of all the beneficiaries on whom the burden of costs would ultimately fall or, if for any reason this is not forthcoming, to seek the court's directions by issuing a claim form to that end¹. If the beneficiaries' consent or the court's sanction is not obtained, the personal representative litigates at his own risk as to costs in the sense that he may be deprived of his right to be indemnified out of the estate if the court considers that he acted unreasonably in prosecuting or defending the claim².

1 See CPR Sch 1 RSC Ord 85 r 2(3)(c); *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, CA. The contents of a Beddoe application are not confidential and may be admitted in evidence: *Midland Bank Trust Co Ltd v Green* [1980] Ch 590, [1978] 3 All ER 555 (on appeal on another point [1981] AC 513, [1981] 1 All ER 153, HL). Accordingly, the Beddoe application should not be made in the claim to which the representatives are parties, and about the conduct of which they are seeking directions, but must be made by a separate claim: *Alsop Wilkinson v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220. See also *McDonald v Horn* [1995] 1 All ER 961, CA; *Singh v Bhasin* (1998) Times, 21 August; and PARA 713 et seq ante. As to the CPR see PARA 37 note 3 ante.

2 *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, CA; *Re England's Settlement Trusts, Dobbs v England* [1918] 1 Ch 24. As to the personal representative's right to indemnity see PARA 437 ante.

UPDATE

811 Leave to bring or defend proceedings

TEXT AND NOTE 1--CPR Sch 1 RSC Ord 85 revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(1) PRACTICE AND PROCEDURE/812. Legal aid.

812. Legal aid.

The Lord Chancellor may modify by regulations the general legal aid provisions¹ so far as it appears to him necessary to meet the special circumstances where a person seeking or receiving advice or assistance on legal aid is concerned in a representative or fiduciary capacity².

1 Ie the provisions of the Legal Aid Act 1988 Pt IV (ss 14-18) (as amended). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477.

2 See the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 33.

UPDATE

812 Legal aid

TEXT AND NOTES--The legal aid system under the Legal Aid Act 1988, which is largely repealed, is replaced by the Access to Justice Act 1999 Pt I (ss 1-26): see further LEGAL AID vol 65 (2008) PARA 2.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(1) PRACTICE AND PROCEDURE/813. Costs.

813. Costs.

Subject to the court's discretion¹, in ordinary cases a personal representative who claims as such and fails is personally liable for the costs of the claim², and, unless the defendant has been guilty of some misconduct inducing the claimant to bring the claim³, the judgment against him will be that the defendant recover the costs to be levied de bonis propriis⁴, but this will not preclude the personal representative from indemnifying himself out of the estate if he is entitled to such indemnity under the principles previously stated⁵.

1 As to the court's discretion to award costs see CPR 44.3. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See *Boynton v Boynton* (1879) 4 App Cas 733, HL.

3 *Godson v Freeman* (1835) 2 Cr M & R 585; *Farley v Briant* (1836) 3 Ad & El 839; *Birkhead v North* (1847) 4 Dow & L 732; *Redmayne v Moore* (1856) 2 Jur NS 691.

4 *Ashton v Poynter* (1835) 1 Cr M & R 738; *Southgate v Crowley* (1835) 1 Bing NC 518.

5 See PARA 437 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/814. Actions by personal representatives.

(2) ACCRUAL OF CAUSES OF ACTION

(i) Survival of Causes of Action

814. Actions by personal representatives.

On the death of a person on or after 25 July 1934¹, all causes of action vested in him survive for the benefit of the estate² except a cause of action for defamation³ which continues to be governed by the maxim *actio personalis moritur cum persona* (a personal action dies with the person)⁴. The statutory right of a person to claim damages for bereavement does not survive for the benefit of his estate on his death⁵. Criminal proceedings are similarly of a personal nature and the court has no jurisdiction to allow a criminal appeal to continue after the death of the appellant even if the estate would benefit financially from a successful appeal⁶.

1 I.e. the date of the passing of the Law Reform (Miscellaneous Provisions) Act 1934. As to deaths before this date, the Administration of Estates Act 1925 s 26(2) (repealed) (replacing the Civil Procedure Act 1833 s 2) enabled a personal representative to maintain, for any injury committed to the deceased's real estate and chattels real within six months before his death, any action which the deceased could have maintained, but the action had to be brought within a year after the death: see eg *Jones v Simes* (1890) 43 ChD 607 at 613. Apart from statute no action could be brought for injury to a deceased's real estate: *Phillips v Homfray* (1883) 24 ChD 439 at 463, CA; on appeal sub nom *Phillips v Fothergill* (1886) 11 App Cas 466, HL.

The Administration of Estates Act 1925 s 26(1) (repealed) (replacing, as to deaths after 1925, 13 Edw 1 (Statute of Westminster the Second) (1285) c 23; 25 Edw 3 stat 5 (1351-2) c 5; and 31 Edw 3 stat 1 c 11 (1357)) provided that for any debt due to a deceased person, and for any injury to or right in respect of his personal estate in his lifetime, his personal representative should have the same right of action as the deceased would have had if alive. These statutes applied to all torts except those relating to the testator's freehold and those where the injury done was of a personal nature: *Twyccross v Grant* (1878) 4 CPD 40 at 45, CA, per Bramwell LJ.

2 Law Reform (Miscellaneous Provisions) Act 1934 s 1(1). The effect of this Act was to abolish the general application of the maxim *actio personalis moritur cum persona*: Law Revision Committee's Interim Report dated 7 March 1934 (see 77 L Jo 246).

3 Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) proviso (amended by the Law Reform (Miscellaneous Provisions) Act 1970 s 7(2), Schedule; and the Administration of Justice Act 1982 s 75, Sch 9 Pt I). In the event of the insolvency of an estate against which proceedings are maintainable by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 s 1 (as amended), any liability in respect of the cause of action in respect of which the proceedings are maintainable is deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust: s 1(6).

4 The general result of the application of the common law maxim *actio personalis moritur cum persona* was that a personal representative could not sue or be sued for a wrong committed against or by the deceased for which unliquidated damages only would be recoverable: *Kirk v Todd*(1882) 21 ChD 484 at 488, CA; *Pulling v Great Eastern Rly Co*(1882) 9 QBD 110, DC. The principle was applicable both at law and in equity: *Peek v Gurney*(1873) LR 6 HL 377. Accordingly, an action for deceit did not lie against the personal representatives of a person who had fraudulently induced another to take shares in a company, or even to purchase shares from the deceased himself: *Re Duncan, Terry v Sweeting*[1899] 1 Ch 387. It also applied to proceedings authorised by Act of Parliament against a person which were in the nature of an action for personal tort: *Story v Sheard*[1892] 2 QB 515.

The only cases in which, apart from questions of breach of contract express or implied, a remedy for a wrongful act could be pursued against the estate of a deceased person where property or the proceeds or value of property belonging to another had been appropriated by the deceased person and added to his own estate or money. In such cases the action, although arising out of a wrongful act, did not die with the person; but where there was nothing among the deceased's assets which in law or in equity belonged to the plaintiff, and the damages which had been done to him were unliquidated and uncertain, the wrongdoers' personal representatives could not be sued merely because it was worth the wrongdoer's while to commit the act and an indirect benefit might have been reaped by it: *Phillips v Homfray*(1883) 24 ChD 439 at 454, CA, per Bowen LJ and Cotton LJ, and see at 457 et seq for observations upon the earlier authorities.

In such cases proceedings could not be pursued against the personal representative even though the death of the wrongdoer did not take place until after a judgment or order directing an inquiry as to damages: *Phillips v Homfray*(1883) 24 ChD 439, CA (on appeal sub nom *Phillips v Fothergill*(1886) 11 App Cas 466, HL); *Smith v Eyles* (1742) 2 Atk 385; *Davoren v Wootton*[1900] 1 IR 273, CA.

5 Since 1 January 1983, the right of a person to claim damages for bereavement under the Fatal Accidents Act 1976 s 1A (as added and amended) (see NEGLIGENCE vol 78 (2010) PARA 24) does not survive for the benefit of his estate on his death: Law Reform (Miscellaneous Provisions) Act 1934 s 1(1A) (added by the Administration of Justice Act 1982 ss 4(1), 73(1)). See NEGLIGENCE vol 78 (2010) PARA 24 et seq.

6 See *R v Jefferies*[1969] 1 QB 120, [1968] 3 All ER 238, CA. This decision may, however, be narrowly interpreted in view of the statutory origins of the former Court of Criminal Appeal and the present Court of Appeal in criminal matters, and it has been conceded that an appellant's executors have an interest in the recovery of a fine: see *Hodgson v Lakeman*[1943] KB 15, CA; *R v Rowe*[1955] 1 QB 573 at 574, [1955] 2 All ER 234 at 235, CCA, per Goddard CJ. As to criminal appeals see also PARA 824 post.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/815. Actions against personal representatives.

815. Actions against personal representatives.

On the death of a person on or after 25 July 1934¹, all causes of action subsisting against him² survive against his estate³ except causes of action for defamation or bereavement⁴.

1 See PARA 814 note 1 ante. As regards deaths before that date, the Administration of Estates Act 1925 s 26(5) (repealed), replacing the Civil Procedure Act 1833 s 2 (repealed), enabled an action to be brought against personal representatives for a wrong committed by the deceased to another person in respect of his property, provided the injury was committed within six months before the wrongdoer's death and proceedings were brought within six months after the representative had taken out representation: see eg *Re Williams, Andrew v Williams* (1884) 52 LT 41 (affd (1885) 54 LT 105, CA); *Jay v Jay* [1924] 1 KB 826.

2 Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there is deemed, for the purposes of the Law Reform (Miscellaneous Provisions) Act 1934, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered: s 1(4).

3 See *ibid* s 1(1). As to the proof of liabilities in respect of which proceedings are maintainable under s 1 (as amended) as debts in the administration of insolvent estates see PARA 399 ante. As to the court's jurisdiction to dispense with representatives see PARA 226 ante.

4 *Ibid* s 1(1) proviso (amended by the Law Reform (Miscellaneous Provisions) Act 1970 s 7(2), Schedule; and by the Administration of Justice Act 1982 s 75(1), Sch 9 Pt I), Law Reform (Miscellaneous Provisions) Act 1934 s 1(1A) (added by the Administration of Justice Act 1982 ss 4(1), 73(1)). See also the Fatal Accidents Act 1976 s 1A (as added and amended); and PARA 814 note 5 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/816. Causes of action.

816. Causes of action.

The causes of action which survive for the benefit of or against the estate of the deceased¹ include rights of action founded on breaches of contractual obligations², rights of action for personal injuries to the deceased, including claims for damages for pain and suffering³ and for loss of expectation of life⁴, and rights of action founded on statutory duties or rights, if as a matter of construction the statute envisages this⁵. However, it has been held that the court should be cautious in extending the meaning of 'causes of action' to applications for financial relief in the Family Division which are essentially personal in nature arising between parties to a marriage or children of a marriage and deriving from no source other than the matrimonial legislation⁶. A claim for provision under the Inheritance (Provision for Family and Dependents) Act 1975 does not survive for the benefit of the claimant's estate⁷.

A claim for penalties for incorrect income tax returns is a cause of action which survives against a deceased person's estate⁸, but the right to apply for secured maintenance after a decree absolute in matrimonial proceedings is not⁹.

No right or liability of a purely personal nature, dependent on the skill or qualification of one party, can be assigned by operation of law. Therefore the personal representatives may not sue or be sued on such a contract made by the deceased, and the contract is discharged by the death¹⁰. However, they may sue for any money earned by the deceased under the contract¹¹, or even for money accruing after death, if it appears that the parties intended that the remuneration should continue to be payable after the ending of the contract¹². If a party to a contract assigns his rights in equity before he dies, his personal representatives continue to represent him for the purpose of joining or being joined with the assignee in suing the debtor¹³.

1 See PARAS 814-815 ante.

2 See *Beckham v Drake* (1849) 2 HL Cas 579 at 597 per Williams J. See also CONTRACT vol 9(1) (Reissue) PARA 1078. As to the personal representative's liabilities for the deceased's obligations see PARA 761 et seq ante. The damages recoverable are not limited to those which the deceased could have recovered in his own lifetime. The proper measure of damages is the loss to the deceased's estate: *Otter v Church, Adams, Tatham & Co* [1953] Ch 280, [1953] 1 All ER 168. As to the measure of damages see generally DAMAGES vol 12(1) (Reissue) PARA 941 et seq.

3 *Slater v Spreat* [1936] 1 KB 83. As to the limitation period (now three years) for claims for personal injuries by the personal representatives or dependants of a deceased person see the Limitation Act 1980 s

11(5); and LIMITATION PERIODS vol 68 (2008) PARA 998. Fear of impending death felt by the victim of a fatal injury cannot by itself give rise to a cause of action which survives for the benefit of the victim's estate: *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, HL.

4 See DAMAGES vol 12(1) (Reissue) PARA 882.

5 See *Peebles v Oswaldtwistle UDC* [1896] 2 QB 159, CA (action by executors to enforce public health duties); *Darlington v Roscoe & Sons* [1907] 1 KB 219, CA (enforcement by deceased dependant's personal representatives of workmen's compensation claim); *United Collieries Ltd v Simpson* [1909] AC 383, HL (similar case under the workmen's compensation legislation); *Post Office v Official Solicitor* [1951] 1 All ER 522 (employers of injured workman entitled to indemnity under workmen's compensation legislation against estate of deceased who had caused the injury); *Dean v Wiesengrund* [1955] 2 QB 120, [1955] 2 All ER 432, CA (right of deceased tenant's personal representatives to recover overpayments of rent under the Rent Acts); *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, [1958] 1 All ER 657 (statutory rights under the Law Reform (Married Women and Tortfeasors) Act 1935). As to statutory obligations of a purely personal nature which do not survive see PARA 767 ante.

6 *D'Este v D'Este* [1973] Fam 55 at 59, sub nom *D (J) v D (S)* [1973] 1 All ER 349 at 352. See also *Thwaite v Thwaite* [1982] Fam 1, [1981] 2 All ER 789, CA; *Hall & Co v Simons* [1999] 1 FLR 536, CA; *Xydhias v Xydhias* [1999] 2 All ER 386, [1999] 1 FLR 683, CA.

7 *Whyte v Ticehurst* [1986] Fam 192, [1986] 2 All ER 158; *Re Bramwell* [1988] 2 FLR 263. As to provision under the Inheritance (Provision for Family and Dependents) Act 1975 see PARA 665 et seq ante.

8 *A-G v Canter* [1939] 1 KB 318, [1939] 1 All ER 13, CA.

9 See *Dipple v Dipple* [1942] P 65, [1942] 1 All ER 234.

10 *Chamberlain v Williamson* (1814) 2 M & S 408; *Phillips v Alhambra Palace Co* [1901] 1 KB 59 at 63; *Shipman v Thompson* (1738) Willes 103 at 104n; *Farrow v Wilson* (1869) LR 4 CP 744; *Phillips v Jones* (1888) 4 TLR 401; *Blades v Free* (1829) 9 B & C 167; *Foster v Bates* (1843) 12 M & W 226; *Campanari v Woodburn* (1854) 15 CB 400; *Friend v Young* [1897] 2 Ch 421; *Pool v Pool* (1889) 58 LJP 67; *Tasker v Shepherd* (1861) 6 H & N 575; *Graves v Cohen* (1929) 46 TLR 121. As to the principle that a personal contract is frustrated if the promisor becomes incapable of performing it see CONTRACT vol 9(1) (Reissue) PARA 758.

11 *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311.

12 *Wilson v Harper* [1908] 2 Ch 370. See also *Robey v Arnold* (1898) 14 TLR 220, CA; *Salomon v Brownfield and Brownfield Guild Pottery Society Ltd* (1896) 12 TLR 239; *Bilbee v Hasse* (1889) 5 TLR 677 (affd (1890) Times, 16 January, CA); and cf *Nayler v Yearsley* (1860) 2 F & F 41; *Boyd v Mathers* (1893) 9 TLR 443, CA; *Morris v Hunt & Co* (1896) 12 TLR 187; *Gerahty v Baines* (1903) 19 TLR 554; *Knight v Burgess* (1864) 33 LJ Ch 727; *Weare v Brimsdown Lead Co Ltd* (1910) 103 LT 429.

13 *Brandt v Heatig* (1818) 2 Moore CP 184.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/817. Act or omission causing death.

817. Act or omission causing death.

At common law the death of a human being could not be complained of in a civil court as an injury. Accordingly a man's wife or child might suffer the greatest pecuniary loss by his death and would have no remedy against a person who, by an act of negligence, caused the death, even though the victim, if instead of being killed had been incapacitated for life, could have recovered substantial damages¹. This common law rule has been abolished², but where the death has been caused by the act or omission which gives rise to the cause of action, the damages are to be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included³.

1 *Baker v Bolton* (1808) 1 Camp 493; *Osborn v Gillett* (1873) LR 8 Exch 88; *Clark v London General Omnibus Co Ltd* [1906] 2 KB 648, CA; *Admiralty Comrs v SS Amerika* [1917] AC 38, HL; *Jackson v Watson & Sons* [1909] 2 KB 193, CA.

2 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended); and PARA 814 ante. As to earlier statutes which ameliorated the effect of the common law rule see note 3 infra.

3 Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(c). See also DAMAGES vol 12(1) (Reissue) PARA 938. The rights conferred by the Act for the benefit of the estates of deceased persons are in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts 1846 to 1959 (see now the Fatal Accidents Act 1976; and NEGLIGENCE vol 78 (2010) PARA 24 et seq): Law Reform (Miscellaneous Provisions) Act 1934 s 1(5) (amended by the Carriage by Air Act 1961 s 14(3), Sch 2). See also the Carriage by Air Act 1961; and CARRIAGE AND CARRIERS vol 7 (2008) PARAS 121 et seq, 150, 154 et seq. As to the measure of damages under the Fatal Accidents Acts 1846 to 1959 see DAMAGES vol 12(1) (Reissue) PARA 932 et seq; NEGLIGENCE vol 78 (2010) PARA 24 et seq. As to the limitation period for such claims see PARA 816 note 3 ante; and LIMITATION PERIODS vol 68 (2008) PARA 1000.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/818. Exemplary damages.

818. Exemplary damages.

Where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate do not include any exemplary damages¹.

1 Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a)(i) (substituted in respect of deaths occurring on or after 1 January 1983 by the Administration of Justice Act 1982 ss 4(2), 73). As to exemplary damages see DAMAGES vol 12(1) (Reissue) PARA 811.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/819. Covenants relating to land.

819. Covenants relating to land.

Where the deceased person's real estate was not vested in his personal representative¹, the heir or devisee was the proper person to bring an action for breach of covenant relating to the estate, even though committed during the deceased's lifetime, if the ultimate damage accrued after the ancestor's death²; and such an action can now be brought by the personal representative or, in the case of a specific devise, by the devisee after assent. It would appear that any damages so recovered by the personal representative would be held by him on behalf of the specific devisee, if any, but otherwise they form part of the deceased's general estate. The personal representative can, without reference to the fact that the real estate is vested in him, maintain an action for breach of such a covenant, where damage accrued in the deceased's lifetime, whether the covenant is one that runs with the land³ or is merely collateral⁴, but in the latter case he can only sue the original covenantor, and not an assign of the latter⁵. Any damages so recovered would appear to be part of the deceased's residuary personal estate.

1 See PARA 363 note 1 ante.

2 *Kingdon v Nottle* (1813) 1 M & S 355; *King v Jones* (1814) 5 Taunt 418; affd sub nom *Jones v King* (1816) 4 M & S 188.

3 *Morley v Polhill* (1689) 2 Vent 56; *Smith v Simonds* (1687) Comb 64. As to covenants running with the land see SALE OF LAND vol 42 (Reissue) PARA 331 et seq.

4 *Raymond v Fitch* (1835) 2 Cr M & R 588; *Ives v Brown* [1919] 2 Ch 314.

5 *Formby v Barker* [1903] 2 Ch 539, CA; *Chambers v Randall* [1923] 1 Ch 149.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/820. Effect of death of party to claim.

820. Effect of death of party to claim.

Where a party to a claim dies but the cause of action survives, the claim does not abate by reason of the death¹; and, whether the cause of action survives or not, where a party dies after the verdict or finding of the issues of fact and before judgment is given, judgment may be given notwithstanding the death². The personal representatives of a deceased party may obtain an order without notice that they be made parties and the proceedings are then carried on as if they had been substituted for the deceased party³, but they become personally liable for all the costs of the claim ab initio⁴. Where a sole claimant or defendant dies, but no order substituting a new party is made, the other party may, in the case of a cause of action which survives, apply for an order that unless the claim is proceeded with within a specified time the claim is to be struck out as against the party who has died⁵. The court has also power to appoint an interim receiver for the preservation of property, notwithstanding the death of a sole defendant⁶.

1 CPR Sch 1 RSC Ord 15 r 7(1). See also *Jones v Simes* (1890) 43 ChD 607. As to the CPR see PARA 37 note 3 ante. See also CIVIL PROCEDURE.

2 See CPR Pt 19.

3 See CPR 19.1, 19.3. See also *Smith v Williams* [1922] 1 KB 158. As to the possible right of a representative to bring a fresh action: see *Swindell v Bulkeley* (1886) 18 QBD 250 at 255, CA, per Lopes LJ.

4 *Boynton v Boynton* (1879) 4 App Cas 733, HL.

5 CPR Sch 1 RSC Ord 15 r 9(1). Where it is the claimant who has died, however, no such order may be made unless the court is satisfied that due notice of the application has been given to his personal representatives, if any, and to any other interested parties: CPR Sch 1 Ord 15 r 9(1).

6 *Re Parker, Cash v Parker* (1879) 12 ChD 293; *Re Clark, Clark v Clark* (1910) 55 Sol Jo 64.

UPDATE

820 Effect of death of party to claim

TEXT AND NOTE 1--CPR Sch 1 RSC Ord 15 r 7 revoked: SI 2000/221.

NOTES 2, 3--CPR Pt 19 substituted, CPR 19.1, 19.3 now CPR 19.2, 19.4: SI 2000/221. See also *Practice Direction--Group Litigation* (2000) PD 19B (as amended).

TEXT AND NOTE 5--CPR Sch 1 Ord 15 r 9(1) revoked: SI 2002/2058.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/821. Payment out of court.

821. Payment out of court.

The court has jurisdiction to order money paid into court in an action by a defendant to be paid out to the representative of a claimant who has died¹, or to the claimant when the defendant has died².

Accordingly, unless the court otherwise directs, any fund in court directed to be paid, transferred or delivered to a person entitled to it in his own right or as sole or sole surviving executor, is to be paid, transferred or delivered, if that person dies, to his legal personal representative³ or, in the case of certain small estates on an intestacy where there has been no grant of administration, to the relative who would have the prior right to a grant⁴.

Funds in court directed to be paid, transferred or delivered to persons as legal personal representatives may, if any representative has died before the funds are dealt with, be paid, transferred or delivered to the surviving representatives⁵.

1 *Brown v Feeney* [1906] 1 KB 563, CA.

2 *Maxwell v Viscount Wolseley* [1907] 1 KB 274, CA.

3 See the Court Funds Rules 1987, SI 1987/821, r 43; and COURTS. Production of the probate or (where the deceased was entitled to the fund in his own right) letters of administration is required (see r 43(1)), although the proof of death is not required where the funds do not exceed £5,000 in value (r 43(2)). Where a sum not exceeding £5,000 is payable to two or more representatives it may, unless the court otherwise directs, be paid to any one of them: r 43(3).

4 See *ibid* r 43(1). An application is made to the Accountant General by submitting a declaration in Court Funds Office Practice Form 209 (£5,000 and over) or in Court Funds Office Practice Form 210 (sum not exceeding £5,000). As to the Accountant General see COURTS.

5 Court Funds Rules 1987, SI 1987/821, r 43(3). See also note 3 *supra*.

UPDATE

821 Payment out of court

TEXT AND NOTES--As to payment of funeral expenses and inheritance tax out of funds of court, see the Court Funds Rules 1987, SI 1987/821, rr 43A, 43B (added by SI 2007/2617).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/822. Divorce proceedings.

822. Divorce proceedings.

The personal representative of a person who has obtained a decree nisi for the dissolution of his marriage cannot continue the suit for the purpose of making the decree absolute, for it abates on the death of the petitioner or respondent; nor after decree absolute can the petitioner's personal representative continue proceedings to vary the marriage settlement when there are no children of the marriage¹.

1 See MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/823. Death of parties after judgment.

823. Death of parties after judgment.

Where a claimant dies after obtaining judgment, his personal representatives may apply for leave to issue execution¹; until they have obtained such leave they cannot issue a bankruptcy notice against the judgment debtor². Leave to issue execution is also necessary where the defendant has died after judgment³.

1 See CPR Sch 1 RSC Ord 46 r 2(1)(b). As to the CPR see PARA 37 note 3 ante. The appointment of a receiver is not execution within the meaning of this rule: *Re Shephard, Atkins v Shephard* (1889) 43 ChD 131, CA; *Norburn v Norburn* [1894] 1 QB 448. Representatives who desire that a receiver should be appointed should first apply for an order to carry on proceedings under CPR Pt 19 or CPR Sch 1 RSC Ord 15 r 7 (see PARA 820 ante): see *Re Clements, ex p Clements* [1901] 1 KB 260. See also CIVIL PROCEDURE vol 12 (2009) PARAS 1243, 1274, 1285.

2 *Re Woodall, ex p Woodall* (1884) 13 QBD 479, CA. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 139, 678 et seq.

3 See CPR Sch 1 RSC Ord 46 r 2(1)(b).

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(i) Survival of Causes of Action/824. Criminal appeals.

824. Criminal appeals.

In criminal matters the Court of Appeal is confined by the statute creating the jurisdiction¹. This makes no provision for the survival, on the appellant's death, of appeals, whether against conviction or sentence², although it is open to personal representatives to petition the Secretary of State for relief, and he could, if so minded seek the opinion of the court³. However, it has been held that personal representatives may continue an appeal where they have a pecuniary interest, such as a possible right to repayment of a fine⁴, although this exception does not seem to extend to the recovery of costs where the only other surviving interest is the sentimental one of clearing the deceased's name⁵.

1 See the Criminal Appeal Act 1968; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1837 et seq.

2 *R v Jefferies* [1969] 1 QB 120 at 124, [1968] 3 All ER 238 at 240, CA, per Widgery LJ.

3 See *R v Jefferies* [1969] 1 QB 120, [1968] 3 All ER 238, CA.

4 *Hodgson v Lakeman* [1943] KB 15, DC; *R v Rowe* [1955] 1 QB 573 at 575, [1955] 2 All ER 234 at 235, CCA, per Lord Goddard CJ.

5 *R v Rowe* [1955] 1 QB 573, [1955] 2 All ER 234, CCA. See also PARA 814 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1994.

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(ii) Causes of Action arising after Death

825. Injury to property.

As the legal personal representative is in point of law the owner of the property of his testator or intestate, he may maintain claims in respect of injury done to that property after the death of the owner, whether he has been in actual possession of it or not¹; and he may claim either in his individual capacity or in his representative character².

1 *Hollis v Smith* (1808) 10 East 293.

2 *Adams v Cheverel* (1606) Cro Jac 113.

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826. Contracts entered into by personal representative.

In the case of contracts, the personal representative may claim in his representative character wherever the money, when recovered, would be assets of the deceased¹. Accordingly he may claim in his representative character for money lent by him out of the estate², for work done by him as executor³, for goods supplied by him in carrying on the testator's business⁴ or for the deceased's money wrongfully paid away by the representative⁵.

Where one of several executors has entered into a contract on his own account only, the others cannot join him in claiming on the contract, even when the money recovered would be assets; but they can join where the contract was entered into by the executor on account of himself and his co-executors, or generally on account of the estate⁶.

1 *Abbott v Parfitt* (1871) LR 6 QB 346.

2 *Webster v Spencer* (1820) 3 B & Ald 360.

3 *Edwards v Grace* (1836) 2 M & W 190.

4 *Abbott v Parfitt* (1871) LR 6 QB 346. See also *Aspinall v Wake* (1833) 10 Bing 51. However, where the representative, being also the beneficiary, is carrying on the business in his own interest, he cannot claim in his representative character: *Bolingbroke v Kerr* (1866) LR 1 Exch 222, as explained in *Abbott v Parfitt* supra.

5 *Clark v Hougham* (1823) 2 B & C 149.

6 *Heath v Chilton* (1844) 12 M & W 632, explaining *Webster v Spencer* (1820) 3 B & Ald 360 on this point. The position of an administrator is similar to that of an executor: see PARAS 345, 443 ante.

UPDATE

826 Contracts entered into by personal representative

TEXT AND NOTES--Where solicitors instructed by the personal representative have failed to progress the administration of the estate, and, as a result, properties forming part of the estate remain unlet during the administration, the personal representative has a cause of action in his own right: *Chappell v Somers & Blake (a firm)* [2003] EWHC 1644 (Ch), [2003] 3 All ER 1076.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(2) ACCRUAL OF CAUSES OF ACTION/(ii) Causes of Action arising after Death/827. Death of personal representative.

827. Death of personal representative.

Where the proceeds of a contract entered into by a personal representative would form part of the deceased's assets, the person entitled to claim on the contract on the representative's death is the personal representative of the original deceased, who will be the personal representative of the deceased representative where the chain of representation has not been broken¹ and the administrator de bonis non of the original deceased in other cases².

¹ See the Administration of Estates Act 1925 s 7; and PARA 47 ante. As to the chain of representation see PARA 47 et seq ante.

² *Moseley v Rendell* (1871) LR 6 QB 338. As to administration de bonis non see PARA 201 ante.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(3) ACTIONS AGAINST PERSONAL REPRESENTATIVES/(i) Defences and Judgments/828. Defences.

(3) ACTIONS AGAINST PERSONAL REPRESENTATIVES

(i) Defences and Judgments

828. Defences.

A person against whom a claim is made in the capacity of personal representative may in general plead in answer to a claim brought against him in his representative capacity any defence which would have been open to the deceased¹. He may further rely upon the following defences: (1) that he was never executor or administrator (ne unques executor); (2) that he has fully administered (plene administravit), or fully administered with the exception of certain assets (plene administravit praeter); (3) the existence of debts of a higher nature and no assets ultra; (4) the right to set off a debt²; and (5) the expiration of the appropriate period of limitation³.

If the defence of plene administravit or plene administravit praeter is pleaded, the burden of proving assets rests on the claimant⁴, and the personal representative is only answerable to the amount of assets proved⁵. The amount of the duty paid by the executor on obtaining probate is admissible in evidence upon the issue of plene administravit⁶, but is it not prima facie evidence of the amount of assets which have come to his hands⁷.

1 In addition he may in certain instances have a defence by the cause of action not surviving against him: see PARA 815 et seq ante.

2 These defences should be specifically pleaded: see CPR 16.5; *Practice Direction-Statements of Case* (1999) PD 16 paras 12.1-12.3, 16.1, 16.3(1); and CIVIL PROCEDURE. The representative may plead both ne unques executor and plene administravit: *Tyson v Kendall* (1850) 19 LJQB 434. As to set-off see PARA 834 post. As to defences open to a person against whom a claim is brought as executor de son tort see PARA 59 ante.

3 See the Limitation Act 1980 ss 21, 22; and LIMITATION PERIODS vol 68 (2008) PARA 1140 et seq.

4 *Giles v Dyson* (1815) 1 Stark 32.

5 *Erving v Peters* (1790) 3 Term Rep 685 at 688 per Lord Kenyon CJ.

6 *Mann v Lang* (1835) 3 Ad & El 699.

7 *Stearn v Mills* (1833) 4 B & Ad 657, dissenting from *Foster v Blakelock* (1826) 5 B & C 328; *Mann v Lang* (1835) 3 Ad & El 699; *Lazonby v Rawson* (1854) 4 De GM & G 556.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(3) ACTIONS AGAINST PERSONAL REPRESENTATIVES/(i) Defences and Judgments/829. Judgment against future assets.

829. Judgment against future assets.

If the personal representative pleads plene administravit or plene administravit praeter¹ and no other defence, or no other defence except that of outstanding claims of a higher nature and no assets ultra, the claimant may either join issue, or, if he is willing to admit the truth of the plea, may apply for leave to sign judgment for his claim and costs against assets coming to the representative's hands after the date of the judgment, or judgment as to part of his claim against assets acknowledged, and as to the residue of his claim and costs against such future assets². In the latter case costs are not awarded against the representative personally, nor does he get his costs³. Where a party is entitled to execution on a judgment or order against assets coming to the representative's hands after the date of the judgment or order he may apply for leave to issue execution against such assets⁴.

If issue is joined upon the plea of plene administravit and the claimant fails upon that issue, he may enter judgment against future assets, but must pay the personal representative's general costs, even though the representative may have raised other defences in which he has not succeeded⁵.

1 See PARA 828 ante.

2 As to judgment on admissions see CPR Pt 14. See also CIVIL PROCEDURE. As to the CPR see PARA 37 note 3 ante.

3 *Cockle v Treacy* [1896] 2 IR 267 at 270, CA, per Walker C; *Smith v Tateham* (1848) 2 Exch 205; *De Tastet v Andrade* (1817) 1 Chit 629n.

4 CPR Sch 1 RSC Ord 46 r 2(1)(c). Before applying for leave to issue execution the judgment creditor must make a demand upon the representative: see CPR Sch 1 Ord 46 r 4(2)(d).

5 *Millar & Co v Keane* (1889) 24 LR Ir 49; approved in *Cockle v Treacy* [1896] 2 IR 267, CA; *Iggulden v Terson* (1834) 2 Dowl 277; *Hogg v Graham* (1811) 4 Taunt 135; *Ragg v Wells* (1817) 8 Taunt 129; *Edwards v Bethel* (1818) 1 B & Ald 254; *Cockson v Drinkwater* (1783) 3 Doug KB 239; *Lucas v Jenner* (1833) 1 Cr & M 597.

Halsbury's Laws of England/EXECUTORS AND ADMINISTRATORS (VOLUME 17(2) (REISSUE))/11. ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES/(3) ACTIONS AGAINST PERSONAL REPRESENTATIVES/(i) Defences and Judgments/830. Judgment where claimant succeeds on claim only.

830. Judgment where claimant succeeds on claim only.

If the claimant admits the defence of plene administravit¹ and the claim goes to trial on the claim only and the claimant succeeds as to that, he will get judgment of assets coming to the representative's hands after judgment as to the debt, and as to the costs de bonis testatoris et si non de bonis propriis².

Where the representative pleads a denial of the claim and plene administravit praeter³ (as distinguished from plene administravit) and fails on the former, he must pay the costs even though he succeeds on the latter plea⁴.

1 See PARA 828 ante.

2 *Marshall v Willder* (1829) 9 B & C 655.

3 See PARA 828 ante.

4 *Squire v Arnison* (1884) Cab & El 365.

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831. Judgment where personal representative fails.

Where the personal representative fails upon the issue of plene administravit¹, the claimant obtains judgment for his debt and costs to be levied of the goods and chattels and all real and personal estate of the deceased, and in case of deficiency for his costs to be levied out of the proper goods and chattels of the representative². If, upon the issue of plene administravit, it

appears that the representative has been guilty of a devastavit, which has caused a failure of assets, it must be decided that he has assets to that amount, and not a devastavit³. Where the claim is brought against several representatives, all of whom plead plene administravit, and the claimant proves assets in the hands of some only of the defendants, judgment should be entered in favour of the other defendants⁴.

1 See PARA 828 ante.

2 *Gorton v Gregory* (1862) 3 B & S 90, Ex Ch. In *Griffith v Killingley* (1931, unreported), the words 'all the real and personal estate within the meaning of the Administration of Estates Act 1925' were ordered to be inserted in the judgment.

3 Went Off Ex (14th Edn) 312. As to devastavit see PARA 792 et seq ante.

4 *Parsons v Hancock* (1829) Mood & M 330; *Cousins v Paddon* (1835) 2 Cr M & R 547 at 558.

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832. Judgment by default.

If the personal representative allows judgment to go against him by default, or fails to plead plene administravit¹, he admits the claim and that he has sufficient assets to satisfy the claim², but not necessarily that he has sufficient assets to meet costs unascertained at the date of the judgment³. The admission of the claim does not justify the claimant in signing a personal judgment against him⁴.

1 See PARA 828 ante.

2 *Rock v Leighton* (1700) 1 Salk 310; *Ramsden v Jackson* (1737) 1 Atk 292 at 294; *Leonard v Simpson* (1835) 2 Bing NC 176 at 179; *Palmer v Waller* (1836) 1 M & W 689; *Thompson & Sons v Clarke* (1901) 17 TLR 455; *Re Marvin, Crawter v Marvin* [1905] 2 Ch 490; *Batchelar v Evans* [1939] Ch 1007 at 1010, [1939] 3 All ER 606 at 608-609. As to amendment of the defence to plead plene administravit praeter after judgment by default but before inquiry as to damages see *Midland Bank Trust Co Ltd v Green (No 2)* [1979] 1 All ER 726, [1979] 1 WLR 460.

3 *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423, CA.

4 *Skelton v Hawling* (1749) 1 Wils 258; *Erving v Peters* (1790) 3 Term Rep 685; *Lacons v Warmoll* [1907] 2 KB 350 at 360, CA. The judgment in *Re Higgins' Trusts* (1861) 2 Giff 562, that the default judgment binds the representatives' own assets, cannot be supported except as to costs. As to the effect of judgments by default or consent see *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743; and CIVIL PROCEDURE.

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833. Enforcement of judgment.

On a judgment in the High Court against a personal representative *de bonis testatoris* or *de bonis intestati*, the plaintiff may sue on a writ of *fieri facias de bonis testatoris* or *de bonis intestati*, as the case may be¹. If the sheriff makes a return of *nulla bona* the plaintiff may bring an action against the representative alleging a *devastavit*² and, if successful, may obtain execution against the personal representative's own property³.

1 As to *fieri facias* see CIVIL PROCEDURE vol 12 (2009) PARA 1266; SHERIFFS vol 42 (Reissue) PARA 1132 et seq.

2 As to *devastavit* see PARA 792 et seq ante.

3 See CIVIL PROCEDURE vol 12 (2009) PARA 1240; SHERIFFS vol 42 (Reissue) PARA 1132 et seq.

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834. Set-off.

The right of set-off extends to a claim by or against a personal representative where there are mutual debts between the testator or intestate and the other party¹. A debt which has accrued due after the death of the testator or intestate cannot, however, be set off against a debt which accrued due during his life²; and, in general, a debt due to or from a representative in his personal capacity cannot be set off against a claim against, or debt due to, the estate³.

1 See 2 Geo 2 c 22 (Insolvent Debtors Relief) (1728) s 13; 8 Geo 2 c 24 (Set-off) (1734). These Acts have been repealed, but the right of set-off is preserved: CIVIL PROCEDURE vol 11 (2009) PARA 652 et seq. The right to set off existed in equity before the statutory right was given: see *Freeman v Lomas* (1851) 9 Hare 109 at 112-113; and EQUITY vol 16(2) (Reissue) PARA 902; CIVIL PROCEDURE vol 11 (2009) PARA 658 et seq.

2 See eg *Re Gregson, Christison v Bolam* (1887) 36 ChD 223; and CIVIL PROCEDURE vol 11 (2009) PARA 688.

3 See eg *Bishop v Church* (1748) 3 Atk 691; and CIVIL PROCEDURE vol 11 (2009) PARA 690.

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835. Protection of personal representatives.

In addition to the relief which a personal representative may obtain from the court at its discretion¹, he may be entitled to statutory protection where he has given adequate notice for claims by advertisement² or appropriated a sufficient fund to answer future claims in respect of leaseholds³, where he has distributed the estate without ascertaining that no adoption order has been made⁴, where he has distributed the estate and an application under the Inheritance (Provision for Family and Dependants) Act 1975⁵ is allowed after the expiration of six months from the grant⁶, or where the Limitation Act 1980 applies⁷.

1 See PARA 806 ante.

- 2 See PARA 383 ante.
- 3 See PARA 408 ante.
- 4 See PARA 478 ante.
- 5 See PARA 665 et seq ante.
- 6 See PARA 477 ante.
- 7 See LIMITATION PERIODS vol 68 (2008) PARA 1150.

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(ii) Admission of Assets

836. What constitutes an admission of assets.

An admission of assets may be by express acknowledgement or by conduct. If a personal representative suffers judgment to go against him by confession or by default, or fails to plead *plene administravit* or no assets *ultra*¹, it is an admission of assets². The admission by an executor of his indebtedness to the estate at the time of the testator's death is an admission of assets in his hands to the amount of the debt³. Payment of interest for a considerable period on a legacy, as distinguished from a single payment⁴, amounts to an admission of assets to satisfy the legacy⁵. Payment of legacy duty also amounted to an admission⁶, but not where the amount returned on the legacy duty account was returned merely as the estimated value of the legacy⁷. Crediting the legatee with the amount of his legacy in the books of a business in which the testator was a partner is a sufficient admission where the will contains no power to employ the assets in the business⁸, but not where there is a direction that the legacies are to remain in the business⁹. Part payment of a legacy on account is not an admission of assets to pay in full¹⁰.

1 See PARA 828 ante.

2 *Rock v Leighton* (1700) 1 Salk 310; *Skelton v Hawling* (1749) 1 Wils 258; *Re Marvin, Crawter v Marvin* [1905] 2 Ch 490; *Thompson & Sons v Clarke* (1901) 17 TLR 455; *Marsden v Regan* [1954] 1 All ER 475 at 478, [1954] 1 WLR 423 at 429, CA, per Sir R Evershed MR. See also PARA 832 ante. As to estoppel of the personal representative, who fails to raise in former proceedings defences available to him, from raising them in subsequent proceedings see CIVIL PROCEDURE vol 12 (2009) PARA 1191 et seq.

3 *Rothwell v Rothwell* (1825) 2 Sim & St 217 at 218; *Richardson v Bank of England* (1838) 4 My & Cr 165 at 174.

4 *Corpn of Clergymens Sons v Swainson* (1748) 1 Ves Sen 75; *A-G v Chapman* (1840) 3 Beav 255; *Whittle v Henning* (1840) 2 Beav 396; *A-G v Higham* (1843) 2 Y & C Ch Cas 634; *Brewster v Prior* (1886) 35 WR 251; *Parry v Huddleton* (1854) 18 Jur 992.

5 Payment of interest on a specific or demonstrative legacy does not amount to an admission of general assets: *Severs v Severs* (1853) 1 Sm & G 400.

6 *Lazonby v Rawson* (1854) 4 De GM & G 556; *Whittle v Henning* (1840) 2 Beav 396. Legacy duty was abolished by the Finance Act 1949 s 27 (repealed), as regards, among other events, the death of any person after 29 July 1949 and was finally abolished by the Finance Act 1975 s 50(1)(c). Payments of inheritance tax would probably be considered with these authorities in mind.

7 *Hutton v Rossiter* (1855) 7 De GM & G 9.

8 *Townend v Townend* (1859) 1 Giff 201. A personal representative will not be estopped from challenging a partnership balance sheet simply because the deceased had signed earlier balance sheets: *Re White, White v Minnis* [1999] 2 All ER 663, [1999] 1 WLR 2079.

9 *Hutton v Rossiter* (1855) 7 De GM & G 9.

10 *Smith v Stothard* (1837) 1 Jur 540.

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837. Agreement for arbitration.

A reference to arbitration of a claim against the estate is in general considered as a reference not only of the matters in dispute, but also of the question whether the personal representative has assets, and an award by the arbitrator that the representative is to pay a sum of money is equivalent to determining that he has assets to pay the amount¹ unless the award is that the payment is to be made out of assets².

1 *Worthington v Barlow* (1797) 7 Term Rep 453; *Pearson v Henry* (1792) 5 Term Rep 6 (explaining *Barry v Rush* (1787) 1 Term Rep 691); *Re Wansborough, Wansborough v Dyer* (1815) 2 Chit 40. Cf *Robson v -* (1813) 2 Rose 50; *Riddell v Sutton* (1828) 5 Bing 200; *Davies v Ridge* (1800) 3 Esp 101.

2 *Love v Honeybourne* (1824) 4 Dow & Ry KB 814.

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838. Extent of admission.

Although it is very old law that the payment of one legacy is an admission of assets for every other legatee¹, the court endeavours to deal fairly with each case, and not by a mere unintentional admission of assets by executors to subject them to liabilities which they never contemplated or meant to undertake². Therefore, if an executor should choose on his own responsibility, without reference to the state of the assets, to pay small legacies given to employees, it would be hard to say that he had conclusively bound himself to pay all the legacies given by the will³, and an executor who had made a payment to one legatee which was warranted by the existing state of the assets would not be precluded from setting up against the other legatees a subsequent depreciation in value of the estate⁴.

Even as against creditors, the payment of a legacy is not of itself such an admission of assets to pay debts as to disentitle the executor from explaining the circumstances under which the payment was made⁵, nor will payment of interest on a debt amount to an admission of assets for payment of the principal⁶.

- 1 *Cook v Martyn* (1737) 2 Atk 2 at 3 per Lord Hardwicke. See also PARA 515 ante.
- 2 *Morewood v Currey* (1879) 28 WR 213 at 215 per Hall V-C; *Postlethwaite v Mounsey* (1842) 6 Hare 33n; *Cadbury v Smith* (1869) LR 9 Eq 37.
- 3 *Postlethwaite v Mounsey* (1842) 6 Hare 33n at 35 per Wigram V-C.
- 4 *Re Schneider, Kirby v Schneider* (1906) 22 TLR 223.
- 5 *Savage v Lane* (1847) 6 Hare 32.
- 6 *Cleverly v Brett* (1772) 5 Term Rep 8n.

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839-900. Effect of admission.

Although an admission cannot be retracted unless a case of mistake is clearly made out¹, it is susceptible of explanation², and must be taken to have reference to the circumstances with which the personal representative was at the time acquainted, and if the circumstances on which he based his admission fail, the admission fails also³.

On an admission of assets an immediate personal judgment may be made against the representative⁴, whether the claim is by a creditor or a legatee⁵ and even though the creditor claims on behalf of himself and all other creditors⁶, for in so far as the representative has no assets to meet the claim, a rebuttable presumption that he has committed a devastavit arises⁷. An admission of assets by one executor does not preclude a creditor from requiring the other executors to account⁸. An admission of assets to pay a debt covers the interest on the debt⁹.

An express admission of assets for payment of a legacy in an action for recovery of the legacy covers the costs of the action, if the court thinks fit to give them¹⁰, but an implied admission of assets arising from a default judgment or failure to plead plene administravit¹¹ does not cover costs unascertained at the date of the judgment¹².

By admitting assets an executor of an executor renders himself liable to the same judgment as that to which the original executor would himself, if living, have been liable¹³.

- 1 *Drewry v Thacker* (1819) 3 Swan 529 at 548.
- 2 *Payne v Tanner* (1886) 55 LJ Ch 611 at 613; *Brewster v Prior* (1886) 35 WR 251 at 252; *Inge v Kenny* (1845) 4 Hare 452.
- 3 *Horsley v Chaloner* (1750) 2 Ves Sen 83 at 85; *Payne v Little* (1856) 22 Beav 69; *Clark v Bates* (1848) 2 De G & Sm 203.
- 4 *Horsley v Chaloner* (1750) 2 Ves Sen 83; *Say v Creed* (1844) 3 Hare 455 at 459; *Barnard v Pumfrett* (1841) 5 My & Cr 63; *Rogers v Soutten* (1838) 7 LJ Ch 118; *Gordon v Scott* (1844) 3 Hare 459n; *Lincoln v Wright* (1841) 4 Beav 427 at 431.
- 5 *Jeffer v Wood* (1723) 2 P Wms 128 at 131.
- 6 *Woodgate v Field* (1842) 2 Hare 211.
- 7 *Leonard v Simpson* (1835) 2 Bing NC 176; *Batchelar v Evans* [1939] Ch 1007, [1939] 3 All ER 606; *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423, CA. As to devastavit see PARA 792 et seq ante.

- 8 *Norton v Turvill* (1723) 2 P Wms 144 at 145.
- 9 *Foster v Foster* (1789) 2 Bro CC 616; *Tew v Earl Winterton* (1792) 1 Ves 451 at 452, commented on in *Hovey v Blakeman* (1799) 4 Ves 596 at 606.
- 10 *Philanthropic Society v Hobson* (1833) 2 My & K 357.
- 11 See PARAS 828, 832 ante.
- 12 *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423, CA.
- 13 *Davenport v Stafford* (1852) 2 De GM & G 901.

